87-691

Supreme Court, U.S.
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No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

LAWRENCE J. GALARDI,
Petitioner,

VS.

BERNIE LERNER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LAWRENCE J. GALARDI, ESQ.
11755 WILSHIRE BOULEVARD,
SUITE 1370
LOS ANGELES, CALIFORNIA 90025
TELEPHONE: (213) 477-6066
Attorney for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTIONS PRESENTED

1. Is the Refusal of the Bankruptcy Appellate Panel to Hear This Appeal on the Merits a Departure from the Accepted and Usual Course of Judicial Proceedings, Sufficient to Warrant an Exercise of this Court's Power of Supervision?

2. Do the Conflicting Decisions on Pivotal Issues Reached in Three Other Bankruptcy Court Proceedings Warrant the Granting of a Writ of Certiorari?

3. Does the Award of Punitive Damages without Hearing Constitute a Violation of Due Process?

4. Was the Award of $93,652.83 in Attorney's Fees, Without Hearing and Without Evidence, both a violation of due process and an Abuse of Judicial Discretion, Sanctioned by the Bankruptcy Appellate Panel and the Ninth Circuit and Therefore Constituting a Departure from Accepted Judicial Proceeding Sufficient to Warrant an Exercise of this Court's Power of Supervision?

5. Was the Trial Court Without Subject Matter Jurisdiction?

PARTIES

Petitioner submits the following list of all persons or entites which have an interest in the outcome of the case before this Court.

Lawrence J. Galardi — Petitioner
Bernie Lerner — Respondent
David A. Gill — Trustee
Lawrence J. Galardi, A Professional Corporation
— a defendant below
Shari J. Galardi — a defendant below

DATED: September 21, 1987

By LAWRENCE J. GALARDI
Attorney for Petitioner

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STATEMENT

A. Preliminary

This matter was tried in the United States Bankruptcy Court for the Central District of California. The Honorable Russell Seymour presided.[1]

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[1]The case was tried before Judge Seymour on January 24, 25, 26 and 31, 1984. The Reporter's Transcript and Exhibits were not transmitted by the Clerk of the Court to either the Panel or the Ninth Circuit, according to the respective dockets of those courts, although appropriate requests were made to the Clerk of the Bankruptcy Court and the Clerk of the Panel, to do so.

Thereafter, Judge Seymour declined to decide the case. Judge Russell decided the case, entering Findings of Fact and Conclusions of Law and Judgment thereon on June 24, 1985. (Appendix C.) A timely appeal to the Bankruptcy Appellate Panel, (hereinafter, the "Panel"), was taken. (Appendix C.)

The Bankruptcy Appellate Panel failed to process the appeal. Memoranda in its files reveals the case was "lost in the crack" (its characterization), along with approximately twenty others.

An Order Dismissing the Appeal was entered, without notice, on April 23, 1986, on the grounds that the Designation of Record and Statement of Issues were not filed. Those documents had, in fact, been filed as aforesaid and they were lost by the Clerk of the Court.[2] Appellant's Opening Brief to the Panel had also been filed and served on March 19, 1986. (Appendix G; Appendix K.) File stamped copies were placed before the Panel and the Circuit.

A Motion for An Order Vacating the Order Dismissing the Appeal (Appendix H) was denied by the Bankruptcy Panel by Order dated January 2, 1987. (Appendix B.)

In denying the motion, the Panel stated:

> "whatever merits might exist with respect to the Motion to Vacate are overwhelmed by the dilatory conduct of the Appellant."

Petitioner sought extraordinary relief to reinstate the appeal by way of a Writ of Mandate to the United States

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[2]Appendix K sets forth file stamped copies. Appendix G, the Bankruptcy Appellate Panel docket, reveals no entries were made by the Panel Clerk. It also sets forth the staff attorney memo stating this case and approximately twenty others were "lost in the crack."

Court of Appeals for the Ninth Circuit. The petition for writ demonstrated: (1) there was no basis for charging Petitioner with the failure of the Panel to process the Appeal[3]; (2) there was clear reversible error in the trial court; (3) there are significant irregularities in the Clerk's processing of the appeal; and, (4) Petitioner will suffer irreparable harm and there are no other means to protect Petitioner from the harm visited by the decision below.

The Ninth Circuit denied the Petition for Writ of Mandate, per curiam, on June 24, 1987. (Appendix A.)

B. The Judgment Appealed From

The findings, conclusions and judgment appealed from, entered by Judge Russell, appear in Appendix C. Although the case was tried by Judge Seymour, he thereafter declined to decide the case, without explanation. The case was set for re-trial in November of 1984. At that time, all parties announced ready. Judge Russell, however, asked counsel for the parties to instead stipulate to decision on the Trial Transcript, exhibits, pleadings and briefs with the understanding that further testimony and evidence would be permitted as appropriate. Counsel for Petitioner so stipulated.

A hearing was scheduled for March 20, 1985. At that time, however, and without further hearing Judge Russell announced his decision. No additional evidence was taken, no witnesses were called to appear before Judge Russell, at any time. That was *not* the earlier agreement.

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[3]Appendix G. Both the Statement of Issues and Designation of Record were filed during the period the Panel and the Court Clerk's offices were in the process of being moved to their present location in Pasadena.

The issues that had been raised made it clear to all parties that to resolve the conflicting evidence it was necessary for the Court to independently observe the Lerner Brothers and Petitioner, Lawrence J. Galardi, and other significant witnesses in order to independently assess their credibility. Only determining who was telling the truth could resolve the numerous material conflicts in the evidence. Judge Russell failed to do that.

No evidence was taken as to the reasonablility of attorneys' fees or services performed by attorney Lerner or attorney Castenares.[4] There was no trial of punitive damages and they were not an issue in the pretrial order which governed the trial.

Presumably, the statement by the Panel "— whatever merits might exist with respect to the motion to vacate . . ." refers at least in part to the failure of Judge Russell to resolve conflicting testimony and independently determine who and what could be believed as between the Lerner Brothers and Mr. Galardi and the independent witnesses. It is also reasonable to conclude that the panel recognized this as a non-dischargeability case, that there had been an extraordinary award of over $93,000 in attorneys' fees, and that the Panel had "lost" the appeal materials and failed to process this case along with twenty other cases.

C. Factual Summary

Respondent Lerner and Lawrence J. Galardi, a Professional Corporation, entered into an agreement dated De-

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[4]The trial before Seymour was four court days. There were three appearances before Russell and there was no discovery (depositions, interrogatories, etc.) before trial. *$93,652.83 was awarded in fees by Russell.*

cember 1, 1978. The agreement was prepared by attorney Richard S. Lerner, who represented his brother, Bernie Lerner, at all times before and since, and was a party to the agreement but not a party to the litigation.[5]

Bernie Lerner funded $91,000.00 to the Corporation on December 1, 1978. The agreement presented by attorney Lerner for execution on December 1, 1978, required receipt for $101,000.00. (The remaining $10,000.00 loaned was paid over the next several months.)

A finder's fee of $10,000.00 was paid by the Corporation to Attorney Lerner,[6] in connection with the loan.

Attorney Lerner unilaterally embarked upon a course of conduct that incorporated as a major premise, claims that this brother, Bernie Lerner, and his client, John Taylor (a contractor), alternately were or were not partners of both Petitioner individually and of the Corporation, depending on the private purposes he sought to achieve at varying times.[7]

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[5]Judge Russell also entered judgment in what he characterized as a consolidated proceeding, namely, *Lawrence J. Galardi, et al., v. Bernie Lerner*, LA 81-0656 RS. That consolidated case was not tried, however, and no evidence was permitted in the trial court by Judge Seymour. Those Article III issues were eliminated before trial evidence was taken.

[6]It was testified that the following exchange occurred in an earlier proceeding:

Bernie Lerner: "You never told me that you got $10,000 for this deal."

Richard Lerner: "Shut up, stupid."

[7]Other such claims were the subject of another non-dischargeability adversary proceeding, *Taylor v. Galardi*, No. 81-0653 (Seymour), in which Petitioner prevailed. See, Appendix D.

The Bankruptcy Court had earlier dealt with attorney Lerner's *spurious claims of partnership* between Lerner and Galardi, and Taylor and Galardi, on several occasions with the result that findings of *no partnership* had been conclusively made and entered.

Judge Russell's findings and conclusions were made and entered *subsequent* to all of the prior Bankruptcy Court proceedings and constituted the only departure from the clear and unequivocal record that no partnerships have ever existed and the clear and unequivocal proof that there was never an attorney-client relationship with Bernie Lerner. Those facts are pivotal to this petition for Certiorari as Judge Russell's decision is premised upon his finding that this was a partnership giving rise to fiduciary duties and not merely a loan transaction as intended by the parties.

The Bankruptcy Court dismissed an involuntary Petition for Bankruptcy filed by unsecured creditors of Petitioner wherein they asserted claims against the alleged partnership of Lerner/Galardi. The Bankruptcy Court found there was no such partnership or joint venture. Judge Russell ingored that.

During the course of that proceeding, Bernie Lerner, swore under oath "I agreed to *lend* Lawrence J. Galardi the sum of $101,000.00 . . . . I have never at any time held myself out as Lawrence J. Galardi's partner." Judge Russell ignored that, too.

The Bankruptcy Court similarly found earlier that there was no partnership as claimed by attorney Lerner between his client Taylor and Petitioner. The Bankruptcy Court earlier discharged Petitioner with respect to all claims made on behalf of Taylor against Petitioner. (Appendix D.)

REASONS FOR GRANTING CERTIORARI

Petitioner respectfully submits that certiorari should be granted because:

A. The refusal of the Bankruptcy Panel to vacate its Order Dismissing the Appeal and the failure of the Ninth Circuit to require the appeal be reinstated or, in the alternative, to hear the appeal, de novo, on the merits, constitutes a departure from the accepted and usual course of judicial proceedings and warrants an exercise of this Court's power of supervision;

B. The award of punitive damages without hearing, and consequently without notice to Petitioner and without calling Petitioner personally before the Court, to resolve conflicting evidence and credibility, at any time, constitutes a violation of due process;

C. The conflicting decisions on pivotal issues (was there a partnership) reached in three other Bankruptcy Court proceedings warrant the granting of certiorari so as to permit hearing the appeal on its merits;

D. Russell's award of $93,652.83 in attorneys' fees, without evidence as to whether they were reasonably incurred, constitutes an abuse of judicial discretion that was sanctioned by the Bankruptcy Panel and the Ninth Circuit, thereby constituting a departure from accepted judicial proceeding sufficient to warrant an exercise of this Court's power of supervision, even apart from the violation of due process occasioned thereby, in the Court below;

E. The decision below and the intervening failure of the Panel and the Circuit to reverse and discharge the attorneys' fees awarded below has decided a federal question, namely, whether attorneys' fees are recoverable in a non-dischargeability case, in a way which is in conflict

with applicable decisions of Circuit Courts and of this Court;

F. The Court below was without subject matter jurisdiction because neither the Federal Rules of Civil Procedure, the Transition Statute, nor the Emergency Rule empowered the District Court to seat a retired annuitant as a bankruptcy judge.

Accordingly, Petitioner respectfully submits the Judgment below and the orders of the Panel and the Ninth Circuit should be reversed. The Appeal should be heard and decided on the merits. The failure to accord due process and afford judicial review, in these circumstances, Petitioner respectfully submits, warrants the grant of certiorari.

ARGUMENT

Point I

CERTIORARI IS WARRANTED WHERE THE COURT BELOW AND THE INTERVENING APPELLATE COURTS' DISPOSITION CONSTITUTES A SIGNIFICANT DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING WHICH RESULTS IN A DENIAL OF DUE PROCESS.

Rule 17 of the Revised Rules of the Supreme Court of the United States (as amended through June 5, 1987) articulates certain advisory parameters of judicial discretion governing review on certiorari, which while neither controlling nor undertaking to fully measure this honorable court's discretion, sets forth reasons for review that are applicable here. It is suggested that certiorari be granted,

> "(1)(a) When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. . . .
>
> "(c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court."

Rule 17, S.Ct. Rules

Petitioner sought a writ of mandamus vacating the order dismissing appeal entered by the Panel and for other extraordinary relief in the Ninth Circuit pursuant to 28 U.S.C. 1651 et seq. The Court of Appeals declined to exercise its supervisory power over the Panel. The Panel dismissed Petititoner's appeal for reasons of delay in processing the appeal when in fact the appeal was "lost" in the office of the Clerk. No delays were caused or engendered by Petitioner, (Appendix H.), either below or on appeal.

Petitioner sought an order vacating the dismissal once Petitioner learned of the Dismissal. In truth and in fact, the appeal was not processed by the Panel Clerk's office because of confusion that existed at that time in the Clerk's office engendered by both new filings, pending business and the problems associated with moving to new quarters and the employment of new personnel. A discussion of F.R.C.P. 60, 60(a), and 60(b) was provided the Panel and brought to the attention of the Ninth Circuit urging the appeal which had been "lost in the crack" along with approximately twenty other cases, (according to memos in the Panel file) be reinstated.

In that context, there can be no reasonable justification for dismissing the appeal. This Court is asked to correct that abuse of judicial discretion in the exercise of its supervisory powers.

In determining whether to exercise its discretion and issue a writ of mandate pursuant to 28 U.S.C. Section 1651 et seq., the Ninth Circuit had six fundamental factors weighing in favor of issuance of the writ. Petitioner had no other adequate means, such as direct appeal, to attain the relief sought. Petitioner will obviously be irreparably damaged in a way that is not otherwise correctable on appeal, in these circumstances. The judgment appealed from rendered in the Bankruptcy Court is clearly erroneous as a matter of law and the rationale relied upon by the Panel, which recognized merit in the appeal but declined to permit it to go forward on the merits, was premised on an erroneous perception of the facts.

The decision of the Bankruptcy Court manifests persistent disregard of federal rules and disregard in these circumstances of due process. The judgment of the Bankruptcy Court raises new and important problems of first impression, vis a vis, the functioning of the Bankruptcy Court system prior to the 1984 act. *Wheeler v. United States* (1981, CA 9 Wash) 640 F.2d 1116. The Panel declined to resolve the appeal on the merits and the Ninth Circuit's refusal to grant the writ sought constituted an abuse of that Court's discretion. *Castanho v. Jackson Marine* (1981, CA 5 Tex) 650 F.2d 546. It is clear and indisputable that petitioner's right to appeal has been foreclosed by the denial of the writ and it is that fundamental denial of due process, together with the demonstrated need to supervise the conduct of the Court's business both below, at the level of the Panel and in the

Ninth Circuit, that requires granting of certiorari. *United States v. Mehrmanesh* (1980, CA 9 Ariz.) 652 F.2d 766; *In re Bendectin Products Liability Litigation,* (1984, CA 6 Ohio) 749 F.2d 300; *Wheeler v. United States, supra.*

Point II

THERE WAS NO FIDUCIARY RELATIONSHIP HERE WITHIN THE MEANING OF 11 U.S.C. 523(A)(4).

The award of a judgment of non-dischargeability together with punitive damages, premised as it was upon Petitioner being an attorney together with Judge Russell's erroneous perception of the agreement and the conduct of the parties was clearly erroneous. There was no fiduciary relationship artificially created by the agreement warranting a judgment of non-dischargeability on any grounds. *Davis v. Aetna Acceptance Co.* (1934) 293 U.S. 328, 55 S.Ct. 151; *In re Thornton* (9th Cir. 1976) 544 F.2d 1005; *In re Pedrazzini,* (9th Cir. 1981) 644 F.2d 756.

There was no attorney/client relationship. There was no partnership/joint venture fiduciary relationship. There was no limited partnership. And, no trust relationship was artificially created. Accordingly, no more than the loan transaction intended by the parties existed. *Davis v. Aetna, supra.* Both *Thornton* and *Pedrazzini* recognized constructive or resulting trusts do not preclude dischargeability and, since there was no trust and no fiduciary relationship *before the acts complained of,* discharge is not impaired according to the rule in *Davis v. Aetna, supra.* Arguably, the Panel recognized this when it alluded to "whatever merits might exist with respect to the motion to vacate . . .", but, whether perceived or not below, it warrants review on the issues of dischargeability, punitive damages and attorneys' fees. Petitioner submits

only relief by review on certiorari will provide accord with this Court's time-worn, yet ageless, decision in *Davis v. Aetna.*

Point III

IT WAS ERROR AS A MATTER OF LAW FOR JUDGE RUSSELL TO AWARD PUNITIVE DAMAGES WITHOUT FIRST RESOLVING CONFLICTING TESTIMONY AND ISSUES OF CREDIBILITY; AND IN VIEW OF THE EARLIER DETERMINATIONS THAT THERE WAS NO PARTNERSHIP AND NO ATTORNEY-CLIENT RELATIONSHIP.

Review of Judge Russell's action and the summary disposition of the appeal will protect Petitioner who is threatened with irreparable harm and has no other means of protection. *Teleport Oil Co. v. Security Pacific National Bank (In re Teleport Oil Co.)* [9th Cir. 1985] 759 F.2d 1376, at page 1378. See, also *Hialeah Hospital, Inc. v. Department of Health and Rehabilitative Services (In re King Memorial Hospital, Inc.)* [11th Cir. 1985] 767 F.2d 1508, at page 1510; and *Cohen v. Beneficial Industries Loan Corp.* (1949) 337 U.S. 541 for support of the rule that review is mandated where the issues that are raised are too important to be denied review as they present a serious question of law.

Here awarding punitive damages on this record without independently assessing credibility and making a determinative finding as to credibility on conflicting issues first, is patently unjust. It constitutes a denial of due process as does the informal substitution of a judge to decide the case when another judge heard the evidence and observed the witnesses. Judge Russell stated his award of punitive damages was based upon the fact that *the property owner and developer*, Petitioner Lawrence J.

Galardi *is an attorney.* That is error as a matter of law. Judge Russell did not, *at any time* have Petitioner before him, personally. Punitive damages were not an issue framed by the Pre-Trial Order drafted by Respondent's attorneys. It was not an issue mentioned in Respondent's Trial Brief. It was raised post-trial, was not litigated and Judge Russell did not permit it to be defended against by virtue of his summary disposition. Accordingly, it was error to refuse to hear and decide the appeal on its merits. *Wheeler v. United States, supra.*

The earlier dismissal by Judge Seymour of the involuntary petitions filed by unsecured creditors against the alleged partnerships is entitled to both res judicata effect and recognition as the law of the case on those pivotal issues. (LA 82-20725; LA 82-20724).

Petitioner submits res judicata is not a mere matter of practice or procedure inherited from a more technical time. A matter once litigated cannot be brought again into litigation between the parties to the controversy upon any ground whatsoever. *Dowell v. Appelgate* (1894) 152 U.S. 237, 38 L.Ed. 463, 14 S.Ct. 611, ennunciates that timeless principle. The rule is one of fundamental and substantial justice and it must be adhered to in the Bankruptcy Court. It is a rule of both public policy and private peace and it is a rule which should be enforced by this Court to the end that rights once established in a court of competent jurisdiction must be recognized by those who are bound by that judgment in every respect. *Hart Steel Co. v. Railroad Supply Co.* (1917) 244 U.S. 294, 61 L.Ed. 1148, 37 S.Ct. 506.

Furthermore, re-litigation of the same issues vis-a-vis the Lerner/Galardi transaction in a different cause of action or in a different forum is also precluded by rules of Collateral Estoppel. The doctrine is one of preclusive

effect and therefore carries severe jurisdictional penalties. *Lawler v. National Screen Service Corp.* (1955) 349 U.S. 322, 99 L.Ed. 1122, 75 S.Ct. 65. The rule prevails where the parties have had a full and fair opportunity to present the basic issues that are essential to judgment. *Allen v. McCurry* (1980) 449 U.S. 90, 6 L.Ed.2d 308, 101 S.Ct. 411; *Partmar Corp. v. Paramount Pictures Theatres Corp., supra; Cromwell v. County of Sacramento* (1877) 94 U.S. 351, 24 L.Ed. 195. *Lerner's declaration under oath put to rest the claims of partnership and fiduciary duty and precluded any fundamental determination other than the transaction was a loan* with a profit participation contrived by Lerner for the benefit of Lerner. See also, Vestal, "The Constitution and Preclusion/Res Judicata", 62 Michigan Law Review 33 (1963); *Hoag v. New Jersey,* (1958) 356 U.S. 464, 2 L.Ed.2d 913, reh. den. 357 U.S. 933, 2 L.Ed. 1375; *Williamson v. Columbia Gas & Electric Corp.* (C.A.3d 1950) 186 F.2d 464, cert. den., 341 U.S. 921.

The earlier ruling as to no Lerner/Galardi partnership is also "the law of the case" in the underlying bankruptcy proceedings, LA 81-00606 RS. It should have been adhered to consistently. *DeTenorio re Lightsey* (C.A. 5th 1979) 589 F.2d 911, 917, cert. den., 444 U.S. 831; *Zdanok v. Glidden Co.* (C.A.2d 1964) 327 F.2d 944, 952, cert. den., 377 U.S. 934. See also, *Morrow v. Dillard* (C.A. 5th 1978), 580 F.2d 1284, 1291; *United States v. U.S. Smelting Ref. & Mining Co.,* (1950) 339 U.S. 186, 198.

In any event, the res judicata effect removed discretion and compelled a consistent judgment here. *Heiser v. Woodruff, et al.* (1946) 327 U.S. 726; *Southern Ry v. Clift* (1922) 260 U.S. 316.

Finally, construction of the writings as of the time and in the circumstances the writings were made, requires the conclusion that no partnership of any kind was intended

by the parties or created thereby. That is true certainly as to the laws which subsist at the time and place of the making of the contract. *United States Trust Co. v. New Jersey* (1976) 431 U.S.1, 19-20, 52 L.Ed.2d, 108, 97 S.Ct. 1505; *C.I. Engineers & Constructors, Inc. v. Johnson & Turner Painting Co.* (1983) 140 Cal.App.3d 1011, 189 Cal.Rptr. 824. And, that must certainly be the rule of construction applied here in taking cognizance of the parties' intentions, their respective positions and their objectives, at the time they made their agreement. Judge Russell did not preceive that in his reading of the transcript. Here, hindsight assessment of claims made under questionable circumstances after their deal went sour, cannot reasonably be substituted for a full and fair evaluation of what the parties expected both in profits, participation and performance. Neither Lerner nor Taylor were "buying" partnership risks, exposure or liabilities. Clearly, there was no limited partnership established. They wanted *then*, only to be leaders. That was the Court's conclusion in *Taylor v. Galardi* and the result should not be different as to *Lerner*.

Point IV

IT WAS ERROR TO AWARD ATTORNEYS' FEES. AND, THERE IS NO EVIDENCE OF RECORD TO SUPPORT THAT AWARD.

Attorneys' fees are not recoverable in cases involving non-dischargeability. *Fulwiler v. Donald E. Grove* (1980) 624 F.2d 908, 910; *Alyeska Pipeline Service Co. v. Wilderness Society et al.* (1975) 421 U.S. 240; *Coast Trading Company, Inc. v. Collingwood Grain, Inc., et al.* (1984) 744 F.2d 686.

There was no evidence taken or offered that the attorneys' fees were reasonable or were reasonably necessary

to the preparation and trial of the non-dischargeability case, 81-5204, or anything else. Zealous counsel for Respondent asserted the total amount claimed to have been paid by Respondent to his brother attorney Lerner and to trial counsel. No records were produced, no evidence was taken and no authority was cited to justify the award that Judge Russell included in the judgment. (Appendix C. See, footnote 10, this brief.)

The trial took four days and there were three additional court appearances. There was no pre-trial discovery. Awarding $93,652.83 in attorneys' fees, assuming arguendo fees are recoverable, was an intolerable abuse of discretion by the Bankruptcy Judge. It should have been corrected or at least reviewed by the Bankruptcy Panel.

Point V

THE FINDINGS AND CONCLUSIONS ARE CLEARLY ERRONEOUS AS TO PETITIONER, LAWRENCE J. GALARDI, ESPECIALLY IN VIEW OF FINDINGS NUMBERED 4, 5 AND 7.

Findings 4, 5 and 7 (Appendix C, pages 16-17), clearly refer to the Corporation. It is uncontroverted that attorney Lerner insisted that *only the corporation,* (doing business for approximately five (5) years prior to the December, 1978 agreement), be a signatory and party to the agreement. There are no findings and conclusions, and there can be none, that support Judge Russell's having entered judgment against Petitioner, Lawrence J. Galardi. The preliminary language in finding No. 3 "referred to collectively as 'defendant' ", is not curative.

Other fundamental errors abound. Remarkable among them, Judge Russell failed to perceive or ignored the simple mathematics of the transaction. It was uncontro-

verted that ninety-one thousand dollars ($91,000.00) was funded by Lerner on December 1, 1978 and $10,000 additional was paid later. Petitioner paid $76,775.00 to escrow, an additional $5,233.00 was paid in escrow costs, $13,680.00 was paid in commissions, and $10,000.00 was paid to attorney Lerner as a "finder's fee." Thereafter, over $45,000 was paid in interest. The Court's assessment of compensatory damages was clearly erroneous.

Point VI

THERE ARE NO FINDINGS OR CONCLUSIONS WHICH SUPPORT ENTRY OF A JUDGMENT IN ADVERSARY PROCEEDING LA 81-0656 RS.

Judge Russell entered judgment in the adversary proceedings styled *Lawrence J. Galardi, Lawrence J. Galardi, a Professional Corporation, and Shari J. Galardi v. Bernie Lerner*, adversary number LA 81-0656 RS. That case involved Article III issues. It was "consolidated" by Judge Russell after the trial was concluded. *It was not tried before Judge Seymour.* He limited the trial to dischargeability only. No evidence was taken *or permitted by the trial judge* and Judge Russell took no evidence with regard to it. Petitioner was denied the opportunity to litigate the claims against the Lerners for wrongful attachment, interference with the loans and the refinance plan and the various breach of contract and interference with contract claims occasioned as a result of the Lerners' spurious partnership allegations and their conduct, which interfered with and prevented Petitioner's refinance of his three projects.

The erroneous entry of judgment denied access to an Article III Court and has deprived Petitioner of constitutional rights to due process that can be corrected only upon a direct appeal. That was denied Petitioner by both

the Panel and the Circuit in its denial of Mandamus. Accordingly, Petitioner submits, only review upon Certiorari will afford due process.

Point VII

THE COURT WAS WITHOUT SUBJECT MATTER JURISDICTION. NEITHER THE FEDERAL RULES OF CIVIL PROCEDURE, THE TRANSITION STATUTE, NOR THE EMERGENCY RULE EMPOWERED THE DISTRICT COURT TO SEAT A RETIRED ANNUITANT AS A BANKRUPTCY JUDGE.

A. Seating a Retired Annuitant Exceeded the Powers of the District Court. That is Significant here Because Judge Seymour, for Undisclosed Reasons, Failed to Decide the Case that he Tried.

In 1985, after the trial, it became apparent that Judge Seymour was not a sitting Bankruptcy Judge during the transition. Accordingly, there was no authority under the Emergency Rule at the time of the trial, for the appointment of Judge Seymour as a "Bankruptcy Judge". The Transition Statute, Section 404(a) of the Bankruptcy Reform Act of 1978 and the Bankruptcy Act of 1898, upon close examination, do reveal precedent for the appointment of Referees, Conciliation Commissioners or Special Masters. However, the Order of Judge Kelleher (Appendix I) "reappoints" Judge Seymour as a full-time Bankruptcy Judge. No measure of reasoning, however, provides constitutional authority for a District Judge to appoint a Bankruptcy Judge. Petitioner submits, at least one reasonable conclusion for Judge Seymour's failure to memorialize his tentative decision was someone's perception that he had no power (jurisdiction).

On November 13, 1981, Judge Seymour was "extended as a full-time Bankruptcy Judge" by Judge Hauk. (Appendix I) That appointment was not a constitutional exercise. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.* (1982) 458 U.S. 50, 102 S.Ct. 2858.

Thereafter, on June 10, 1982, Judge Seymour was again reappointed "a full-time Bankruptcy Judge" but only for the express purpose of presiding over *Beverly Hills Bancorp,* a case pending in the Central District. (Appendix I). Arguably, the Chief Judge may have thus accomplished the appointment of a Special Master.

On February 9, 1984, Chief Judge Real appointed Judge Seymour to serve as a "re-employed annuitant" on a per diem basis "as a part-time Bankruptcy Judge . . . for the express purpose of presiding over certain (otherwise unidentified) bankruptcy matters . . . ." (Appendix I). That appointment sounds like a special reference — it came after *Marathon* and it acknowledges the pendency of bankruptcy matters before the District Court.

If there is any doubt that Russell B. Seymour was anything more than a Referee or Special Master and only in those cases where constitutionally empowered by a specific legal Order of Special Reference or appointment, Petitioner respectfully refers this Court to the Order of Judge Curtis dated *April 16, 1984,* "Withdrawing Reference and Appointment of Special Master" pursuant to FRCP 53. It did not refer to or rely upon or acknowledge the "re-employment" of Judge Seymour as a retired annuitant as did the earlier Orders, it paid Judge Seymour a per diem as a Special Master (authorized Under Rule 53), and it cured, in all respects, the prior unconstitutional exercise of judicial power by Judge Seymour (Appendix I).

B. The Federal Rules Do Not Empower the District Court to Appoint Retired Annuitants as Bankruptcy Judges.

The Federal Rules are not constitutionally available to implement a system of bankruptcy courts and judges any more than the Congress can confer Article III powers through the Magistrates Act. *Pacemaker v. Instromedix, etc.*, 725 F.2d 537 (1984).

The Congress has said the Federal Rules, prescribed by the Supreme Court, shall not "abridge, enlarge or modify any substantive right." (28 U.S.C. Section 2072) The Supreme Court was empowered to prescribe rules for the practice and procedure to be followed under Title 11, the Bankruptcy Act of 1978. Those rules, too, "shall not abridge, enlarge or modify any substantive right." (28 U.S.C. Section 2075).

The Emergency Rule adopted by the Executive Committee of the Judicial Conference and implemented by Order of the United States District Court (entered December 27, 1982) (Appendix M) cannot serve to expand, limit or modify rights that have constitutional protection. Clearly, were it possible to cure the lack of subject matter jurisdiction by rule-making, there would have been absolutely no reason for the Supreme Court to stay its judgment in *Marathon*.[8]

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[8]The fact that Judge Russell noted on March 20, 1985, that *Marathon* had been decided, is not curative. Rather, it expresses recognition of the lack of subject matter jurisdiction in *this* case, on *these* facts, as to Judge Seymour. Judge Russell should have insisted on a new trial before an Article III court (since there were affirmative cross-claims). Failing to do so constituted a denial of due process. The Court compounded that denial when it entered judgment in adversary proceeding 81-0656, as those issues were not litigated. They were not included in the Pre-Trial Order and *were specifically*

While in a proper case it might be argued that the failure of the Congress to act created procedural uncertainty on the one hand and removed available substantive remedies on the other, that was not the basis upon which Judge Seymour severed the Article III issues, proceeded to try the case and then declined to decide it. The Respondent cannot therefore be heard in these circumstances, to reasonably argue the need to cure procedural uncertainties and continue the Bankruptcy Court system as a basis for somehow conferring subject matter jurisdiction on Judge Seymour.

The constitutionality of *Marathon* is not at issue here. the within appeal involves the constitutional need for an adequate and demonstrable effort at fair trial, a decision rendered on the merits and review. While this Court concluded in *Raddatz, infra,* that taking testimony was not required in all cases it, nevertheless, maintained the rule that "review" meant conducting a review in order to reach an independent determination of the issues that required Article III adjudication. *United States v. Raddatz,* 447 U.S. 667, 100 S.Ct. 2411 (1980). Here, the Bankruptcy Court Judge "went off the deep end" and the Panel, *albeit recognizing the merits of the appeal,* declined to act after its Clerk lost filings and the entire case was "lost in the crack" by the Clerk's office (Appendix G).

These issues must be decided on the merits.

Petitioner has no reason to delay a speedy and successful appeal. petitioner could not bond his appeal. Lerner has, and continues to execute, on the judgment appealed from. Against this background the sophomoric conclusion that Petitioner's "dilatory conduct" has "overwhelmed"

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excluded by the trial Judge, who limited the issues and evidence to dischargeability, only.

the merits of the appeal is both factually incorrect and unrealistic. The Petitioner has been required to deal with the club-like atmosphere of the Bankruptcy Court. It is fostered by counsel, Court attaches, the various Clerk's offices and, if the results complained of here are any measure, the Court below as well. Petitioner has been without representation for several years since over $6,500,000.00 of property and assets have been lost. Attaining the mythical "fresh start" is a fiction. It is impossible to reasonably conclude that the decision of the Panel was a reasoned and considered attempt to do justice. It is, however, reasonable to conclude it was simply adopted at the urging of a staff attorney (who authored the "lost in a crack" memorandum), defensive of their office system where the appeal file was "lost" and without the benefit of having reviewed the record. That is manifestly unjust.

In refusing to review the decision below on the merits, the Panel ignored why the trial judge did not decide the case and ignored the prejudice to Petitioner's constitutional rights. While the *dischargeability issues* arguably involved a "core proceeding", the case could not be tried by a Referee or Special Master cloaked with judicial powers and then given to a Bankruptcy Judge for decision under the guise of Judge Seymour "leaving the Bench." It was nothing more than an attempt at justification of the overzealous pursuit below. To permit that would at once bestow credibility on erroneous Findings and Conclusions of "the Bankruptcy Court" constituted as it was by a Retired Annuitant as Trial Judge and Judge Russell as decision-maker, and justify having denied access to the judicial power of the United States, in an Article III Judge, as necessary, or, a duly constituted Bankruptcy Trial Court, where appropriate. And, he did

not leave the Bench after January 31, 1984, the last day of trial, (Appendix I, see, Order dated February 9, 1984).

There was sound reason for either Judge Seymour, who was fully cognizant of his status, or Judge Russell, who was, or should have been, to decide that an Article III Court, should retry the case or at the least a duly constituted Bankruptcy Judge should expand the record as necessary and in accordance with the stipulation, before rendering a decision.

Pacemaker, supra, denied bankruptcy judges any such aggrandizement of their power and reaffirmed *Marathon.*

Carter, et al., v. Lumis, etc., 12 B.C.D. 536 (C.D. Calif. 1984) found the 1984 Act simply "codified" that Court's (Judge Takasugi's) perception of review and the District Court's functioning under the Emergency Rule. The 1984 Act has been tested somewhat and it is surviving. The Panel and the Circuit should have viewed the way the system functioned in theory under the Emergency Rule on March 20, 1985 (the date of the hearing). In this case, it was not in all respects constitutional *because of how it failed to function* and the "informal" steps that were taken to obtain a decision after Judge Seymour had announced his belief that Petitioner was *not* a fiduciary. (Transcript, Jan. 31, 1984, page 106, line 16).

The Court below clearly "altered, abridged and modified" Petitioner's substantive rights. That is the effect of there having been a decision on issues that were not litigated, and no new trial and/or review here as mandated by the Emergency Rule. Without trial and review, this was an ill-conceived, illegal, rubber-stamp procedure.

It was an oft-repeated error and the continuing effort to maintain Judge Seymour as a Bankruptcy Judge manifested a persistent disregard for the federal rules and the

tenets of Article III jurisdiction. Accordingly, the Circuit's failure to issue its Writ of Mandamus re-instating the appeal constituted an abuse of judicial discretion. *Wheeler v. United States, supra.*

C. The Transition Statutes and the Emergency Rule Did Not Empower the District Court to Appoint a Retired Referee as Bankruptcy Judge. A Review of What Occurred and an Analysis of the Law is not Merely an Intellectual Exercise Since it Helps Explain the Perceptions that Resulted in Judge Russell Being Asked to Act in Place of the Judge Who Heard the Evidence.

The Emergency Rule provided for a general reference to the Bankruptcy Judges of the Central District [(C)(c)(1) "Reference to Bankruptcy Judges"]. Those judges had been appointed to office for 14-year terms by the President, with the advice and consent of the Senate [28 U.S.C. Section 152, 153(a)], and were subject to removal by the "Judicial Council of the Circuit" on account of incompetence, misconduct, neglect of duty or physical or mental disability" (28 U.S.C. Section 154).

Incumbent Bankruptcy Referees serving six-year terms for compensation were designated to serve as Bankruptcy Judges until March 31, 1984, or until their successors took office [28 U.S.C. Section 404(b)]. The District Court by Order dated November 12, 1982, appointed Judge Seymour, a Retired Annuitant, to serve as a Bankruptcy Judge. (Appendix I.)

28 U.S.C. Section 452 entitled "Definitions", identifies those judges of the Courts of Appeals, District Court, Court of International Trade "any any Court created by act of Congress, the judges of which are entitled to hold office during good behavior." (28 U.S.C. Section 451)

Judge Seymour had earlier retired from office as a Referee, and, that status is *not* included.

In the 1978 Act, Congress intended original but not exclusive jurisdiction in the District Court in matters arising under Title 11 [28 U.S.C. Section 1471(b)]. That jurisdiction was to be exercised by the newly created Bankruptcy Court and the judges of that Court serving without tenure.

Since Article III bars Congress from establishing, under its Article I powers, legislative courts to exercise jurisdiction over all matters arising under the Bankruptcy Laws, the grant of jurisdiction could not be sustained as an exercise of Congress' power to create adjuncts to an Article III Court. the Bankruptcy Court therefore functioned solely (at the time of the trial below) by virtue of the Emergency Rule.

It must be concluded that the appointment by the District Court of a retired annuitant, a private citizen as it were, who did not have status as a Judge of any Court created by Act of Congress, was improper. The District Court was neither empowered under the so-called transition statutes [Section 404(d)] or any other power including the power hereinabove discussed in the Emergency Rule to thus deal with the exceptional circumstances found to exist by virtue of this Court's decision in *Marathon*.[9]

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[9] *Marathon* held Section 241(a) was non-severable and it struck the entire statute, leaving no remnant of power in either Court. Without some remnant of power, the District Court had no basis upon which to appoint the Retired Annuitant except as a Special Master under F.R.C.P. 53. Assuming, *arguendo*, that there is room to conclude Section 241(a) was severable, the mandatory reference called for in 28 U.S.C. Section 1471(c) is exclusive and prevents the exercise of power by the District Court under Sections 1471(a) and 1471(b).

Uncomfortable as thus concluding may be, the fact remains that there was no authority pursuant to which the District court could designate Judge Seymour to sit or permit Judge Russell to decide a case summarily without first satisfying himself that Petitioner Lawrence J. Galardi did not have "two heads" and without observing the conduct and demeanor of the Lerner Brothers and their lack of credibility.[10]

Responsible jurists sitting as trial judges resolve conflicting evidence as a matter of course. Research reveals absolutely no case in which punitive damages have been awarded without the Court first taking the measure of the defendant, without an appearance before the judge and without an independent assessment of the defendant. Petitioner submits our system affords or should afford that guarantee and without review upon certiorari, that fundamental right of due process is lost to Petitioner.

The bankruptcy system continued while Congress continued to consider remedial legislation. Judge Russell did not address that, however, presumably because it was perceived that Judge Seymour was without power. During the congressional exercise, disagreement over the status of Bankruptcy Judges increased. No one focused on "Retired Annuitants" however. The House Judiciary Committee reported its Conclusions (significantly, in early 1983) that an Article III Bankruptcy Court was

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There is no room to conclude, therefore, that the District Court had any authority to appoint a retired annuitant who had no standing as a judge of a United States Court. And, that was not cured by ignoring the absence of jurisdiction and simply contriving a circumstance that permitted Judge Russell to summarily rule on substantive issues.

[10]Both awarding punitive damages and entering a judgment in adversary proceeding 81-0656 RS are certainly without the ambit of a "core proceeding" and thus require an Article III court, in any case.

needed. [H.R. 3, 98 Congress, Rep. No. 9. Pt. 1, 1st Sess. (193)]. Later the Senate Judiciary Committee reported a bill establishing non-Article III Bankruptcy Judges to "assist the District Courts" which would "retain" bankruptcy authority (S. 1013, 98 Congress; see, S. Rep. No. 55, 98 Congress 1st Sess. (1983)]. That report concluded as this Court had concluded in *Marathon* that the jurisdictional grant of the District Court was to be exercised exclusively by the Bankruptcy Court, which was a "non-adjunct" Court, a "non-legislative" Court and a "non-Article III" Court. That is why Judge Seymour had no power and whoever made or participated in the decision to transfer this case to Judge Russell, recognized that.

Shortly prior to the termination of the transition period, the House agreed with the Senate position and Bankruptcy Judges were made "adjuncts" of the District Courts. (See, H.R. 5174, 98 Congress, 2nd Sess. with S. 1013, 989 Congress, 2nd Sess.)

Thereafter, an interim measure amending the 1978 Act extended the transition period for *appointed Judges* to April 30, 1984 [B.L. No. 98-249, 98 Stat. 116 (March 31, 1984)]. Another extension of the transition period to March 25, 1984 [P.L. No. 28-271, 98 Stat. 163 (April 30, 1984)] and a series of additional extensions of the transition period were then enacted prior to the agreement by both houses to the Conference Report in June of 1984.

The "Bankruptcy Amendments and Federal Judgeship Act of 1984" were the result. (P.L. No. 98-353, 98 Stat. 33, July 10, 1984). *This trial was concluded by Judge Seymour six months earlier, on January 31, 1984.*

The 1984 Act resolved the transition of "Bankruptcy Judges." It must be noted that the terms of the *judges then sitting by appointment* (28 U.S.C. Section 152), con-

tinued by operation of the holdover provisions in sections 404(b) and (d) of the Bankruptcy Act of 1978.

The *retired annuitant sitting below, however, was appointed by District Court Order outside the operation of the transition provisions and without benefit of being a retained Bankruptcy Judge in office after the expiration of the stated term or until a successor took office.*

The District Court therefore had no power to thus act and certainly the Bankruptcy Court could not, "in-house" and acting even on its own recognition of the problem, cure it by arranging the transfer of the case to Judge Russell.

The Retired Annuitant was not a "sitting judge" within the meaning of the transition statutes. His earlier right to hold over as a referee had long since expired. There was no authority to appoint judges conferred upon the District Court by the 1978 Act and that authority is not inherent in the District Court, in any case. There was no threat of disruption of the bankruptcy system, here. That is why *the transition statute and the holdover provisions were critical to who was permitted to sit* during the period June 28, 1982 through July 19, 1984.[11]

Finally, Judge Seymour's appointment was clearly in violation of the "Appointments Clause" (Article II, section 2, clause 2 of the Constitution). Being neither a then-

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[11]Had Judge Seymour been other than a retired annuitant, arguably, Article II, section 2, clause 2 of the Constitution might have colored the authority of the District Court to extend a sitting Bankruptcy Judge by virtue of the constitutional grant to the Congress of authority to vest appointment to inferior offices, as applicable, in the court of law. *Myers v. United States*, 272 U.S. 52, 128 (1926). But, Article II, section 2, clause 2 and 28 U.S.C. Section 152 cannot be circumvented by a District Court appointment.

sitting Bankruptcy Judge appointed under 28 U.S.C. section 152, or an incumbent Referee, there was no constitutional authority for his holding-over and there was no constitutional authority for his appointment. He was without power to try or decide the case.

Therefore, Petitioner respectfully submits this Court should grant certiorari.

SUMMARY OF ARGUMENT

CERTIORARI SHOULD BE GRANTED

The refusal of the bankruptcy panel to hear this appeal on the merits constituted a departure from the accepted and usual course of judicial proceedings. In these circumstances, that departure was extraordinary. The failure of the Ninth Circuit to issue its Writ of Mandamus reinstating the appeal constituted an abuse of discretion and a departure from the accepted and usual course of judicial proceedings sufficient to warrant an exercise of this Court's power of supervision.

The conflicting decisions in the bankruptcy court on pivotal issues, i.e. whether there was or was not a partnership, and the consequent prejudice to Petitioner and denial of due process, warrant review upon certiorari.

The award of punitive damages without opportunity for hearing and without personally observing Petitioner and otherwise determining the credibility of witnesses with respect to critical conflicting testimony, constitutes a violation of due process.

The award of $93,652.83 in attorneys' fees without first taking evidence as to whether the fees were reasonably necessary and reasonably incurred and without making appropriate findings, is both a violation of due process, in

conflict with decisions in other Circuits and of this Court, and an abuse of judicial discretion. The failure of the Panel to review and of the Ninth Circuit to reinstate the appeal so as to permit review on the merits, constitutes a departure from accepted judicial proceeding sufficient to warrant exercise of this Court's power of supervision.

The trial court was without subject matter jurisdiction. The district court had exceeded its authority in appointing a retired annuitant as a bankruptcy judge. There was no authority for that appointment in either the transition statutes, the holdover provisions, the Federal Rules of Civil Procedure or, by virtue of any provision of the Constitution of the United States.

The findings of fact entered by Judge Russell, who did not try the case, were clearly erroneous in material particulars. The conclusions of law and judgment entered by Judge Russell were in error, as a matter of law. The Panel had adequate and persuasive reasons before it, as did the Ninth Circuit, to mandate review.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits this Petition for Writ of Certiorari should be granted.

DATED: September 21, 1987

Respectfully submitted,

LAWRENCE J. GALARDI
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 22, 1987, I served the within Petition for Writ of Certiorari in re: "Lawrence J. Galardi v. Bernie Lerner" in the United States Supreme Court, October Term 1987. Appendix filed under separate cover, No. ...

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Anthony Castanares, Esq.
Stuttman, Treister & Glatt
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010
(three copies)

Richard S. Lerner, Esq.
1800 Avenue of the Stars, Suite 1000
Los Angeles, California 90067-4212
(three copies)

Max Rush, Esq.
Sulmeyer, Kupetz, Bauman & Rothman
300 South Grand Avenue
Fourteenth Floor
Los Angeles, California 90071
(three copies)

Robinson, Wolas & Diamant
1888 Century Park East
Los Angeles, California 90067
(three copies)

Clerk, United States Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(original and forty copies)

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 22, 1987, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA

87-691

Supreme Court, U.S.
FILED
SEP 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

LAWRENCE J. GALARDI,
Petitioner,

vs.

BERNIE LERNER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE J. GALARDI, ESQ.
11755 Wilshire Boulevard,
Suite 1370
Los Angeles, California 90025
Telephone: (213) 477-6066
Attorney for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

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APPENDIX "A"

No. 87-7187

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE J. GALARDI,
Petitioner,

VS.

UNITED STATES BANKRUPTCY APPELLATE PANEL,
Respondent,

and

BERNIE LERNER,
Real Party in Interest.

ORDER

BAP# 85-1133 Central California

Before: BROWNING, PREGERSON and ALARCON,
Circuit Judges

Filed: June 24, 1987, Cathy A. Catterson,
Clerk U.S. Court of Appeals.

The petition for writ of mandamus is denied.

APPENDIX "B"

BAP No. CC 85-1133

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

In re LAWRENCE J. GALARDI; LAWRENCE J. GALARDI, A Professional Corporation; SHARI J. GALARDI,
Debtors.

BERNIE LERNER,
Plaintiff/Appellee,

vs.

LAWRENCE J. GALARDI; LAWRENCE J. GALARDI, A Professional Corporation; SHARI J. GALARDI,
Defendants/Appellants,

LAWRENCE J. GALARDI; LAWRENCE J. GALARDI, A Professional Corporation; SHARI J. GALARDI,
Plaintiffs/Appellants,

vs.

BERNIE LERNER,
Defendant/Appellee.

ORDER

Bankruptcy No. LA 81-00606-BR,
Adversary No. LA 81-5204-BR, LA 81-0656-BR

Before: Mooreman and Volinn, Bankruptcy Judges.

Filed January 2, 1987, Clerk U.S. Bkcy. App. Panels of the Ninth Circuit.

The Bankruptcy Appellate Panel (BAP) has reviewed the Motion for Order Vacating Order Dismissing Appeal, and the Memorandum in Support thereof. Whatever merits might exist with respect to the motion to vacate are overwhelmed by the dilatory conduct of the Appellant. The motion is hereby

ORDERED DENIED.

APPENDIX "C"

ANTHONY CASTANARES, a member of
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION
3699 Wilshire Blvd., Suite 900
Los Angeles, California 90010
Telephone: (213) 251-5100
and
LAW OFFICES OF RICHARD S. LERNER
9777 Wilshire Blvd., Suite 1000
Beverly Hills, California 90212
Telephone: (213) 274-0856
Attorneys for Plaintiff

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,
Debtors.

BERNIE LERNER,
Plaintiff,
v.
LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,
Defendants.

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,
Plaintiffs,
v.
BERNIE LERNER,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Bankruptcy No. LA 81-00606-BR;
Adversary No. LA 81-5204-BR;
Consolidated Adversary No. LA 81-0656-BR
Date: March 20, 1985 Time: 9:30 A.M.
Place: Courtroom of the Honorable Barry Russell

Filed June 18, 1985, Clerk U.S. Bankruptcy Court, Central District of California, by . . . . . Deputy Clerk.

At Los Angeles, California, this day of , 1985.

This matter came on for trial before the Honorable Russell B. Seymour, United States Bankruptcy Judge, on January 24, 25, 26, and 31, 1984. The trial was completed and the matter fully submitted, but Judge Seymour left the Bench without deciding it. It was then submitted to the undersigned United States Bankruptcy Judge for further proceedings. It was set for retrial on November 13, 14, and 15, 1984. On the first of those dates, the parties and their attorneys appeared and announced their readiness. The Court inquired of the parties whether they would stipulate to permit the undersigned United States Bankruptcy Judge to review the trial transcript, the pleadings, the briefs, and the exhibits introduced, and to submit the matter for decision on that basis, with the Court reserving the right to call for such further evidence or argument as the Court deemed appropriate. The parties so stipulated in open court, and a further hearing was set for March 20, 1985. At that time, Plaintiff appeared by his counsel, Anthony Castanares, a member of Stutman, Treister & Glatt Professional Corporation and Defendants appeared by their counsel, Max Rush, Esq., a member of Sulmeyer, Kupetz, Baumann & Rothman. The Court requested that the parties, by their counsel, reaffirm their earlier stipulation to submit the matter to the undersigned United States Bankruptcy Judge on the basis set forth above. They did so. Having reviewed the pleadings, the briefs, the trial transcript, and the exhibits received in evidence, the Court makes the following Findings of Fact and Conclusions of Law;

FINDINGS OF FACT

1. Plaintiff Bernie Lerner ("Plaintiff") is an individual with his principal place of residence in Los Angeles, California.

2. Defendants Lawrence J. Galardi and Shari J. Galardi are individuals who reside in Los Angeles County, California.

3. Defendant Lawrence J. Galardi, a Professional Corporation, is a professional corporation with its principal place of business in Los Angeles, California. (Defendant Lawrence J. Galardi and Defendant Lawrence J. Galardi, a Professional Corporation, are sometimes hereinafter referred to collectively as "Defendant." Defendant Shari Galardi will always be separately identified.)

4. On or about December 1, 1978, Plaintiff entered into a written Real Estate Joint Venture Agreement (the "Agreement") with Defendant and the Agreement was executed, "Lawrence J. Galardi, a Professional Corporation, by Lawrence J. Galardi, President."

5. On or about the same date, and concurrent with the execution of the Agreement, Plaintiff delivered to Defendant a cashier's check in the amount of $91,000.00, made payable to Lawrence J. Galardi Professional Corporation Trust Account.

6. On or about the same date, and concurrent with the execution of the Agreement, Defendant accepted $91,000.00 as the partial payment of the $101,000.00 to be paid under the Agreement by Plaintiff, and it was agreed that the balance of $10,000.00 would be paid in monthly installments. The $10,000.00 was subsequently paid in monthly installments within the next nine months, making the total funds advanced by Plaintiff to Defendant the amount of $101,000.00.

7. On or about December 1, 1978, the cashier's check referred to in Paragraph 5, above, was deposited into Defendant's Trust Account at First Los Angeles Bank, Century City Branch, Account No. 671-010839.

8. On or about the same date and time, Defendant's Trust Account obtained a Cashier's Check from First Los Angeles Bank in the amount of $91,000.00 made payable to Lawrence J. Galardi Construction Account.

9. On or about December 1, 1978, Defendant obtained a Cashier's Check from Century Bank in the amount of $75,775.00 made payable to Malibu Escrow Company.

10. On or about December 1, 1978, Defendant deposited the $75,775.00 check with Malibu Escrow Company, for the purchase of the real property commonly known as 6112 Bonsall Avenue, Malibu, California ("the real property").

11. As a part of the purchase price of the real property, Defendant, without first advising Plaintiff, bargained for and obtained an arrangement to the effect that the real estate brokers involved in said transaction would receive their payments in the amount of $4,788.00 and $8,889.00 by way of a deferred payment plan, rather than in cash at the date of the closing of escrow.

12. On or about March 2, 1979, Defendant encumbered the real property by borrowing $60,000.00 from U.S. Life Savings & Loan, secured by a deed of trust on the real property.

13. On or about October 31, 1979, Defendant Lawrence J. Galardi, a Professional Corporation, borrowed $50,000.00 from Business Loans, Inc., and Defendant Lawrence J. Galardi, as an individual, personally guaranteed said loan and granted a trust deed on the real property in the amount of $50,000.00.

14. On or about February 2, 1980, Defendant borrowed $500,000.00, granting the lender a deed of trust covering the real property and another parcel of property (the "Eagle Pass parcel"). The documents provided that the real property could be released from the $500,000 lien by payment of $100,000, but only if the obligation was not in default.

15. As a result of the refinancing described in the foregoing paragraph, the prior note secured by deed of trust in favor of Business Loans, Inc. was paid off in the amount of $45,283.57 principal, interest of $2,286.26, and forwarding fees of $39.00, for a total of $47,608.83. In addition, the previous loan of U.S. Life Savings & Loan, in the amount of $60,469.93, was paid off.

16. Plaintiff at no time received voluntarily from Defendant any interest whatsoever in the Eagle Pass parcel.

17. On or about June 25, 1980, Defendant arranged a loan through Newport Pacific Funding, Inc., in the amount of $250,000.00, which was secured by an encumbrance on the real property.

18. On or about January 8, 1980, Defendant obtained the services of James O. Reece, Appraiser, to do a market evaluation as to the value of the real property, and his appraisal showed the fair market value of the property to be 660,000.00.

19. On or about July 2, 1980, Plaintiff filed in the Superior Court an action against all Defendants (removed to this Court and consolidated herein).

20. On or about September 15, 1980, the Los Angeles Superior Court ordered that all of the matters in controversy between the parties be arbitrated.

21. On or about January 4, 1981, arbitration proceedings commenced under the auspices of the American

Arbitration Association, Anthony John Ward, Esq., as arbitrator.

22. On or about January 10, 1981, Defendant, with Plaintiff's consent, encumbered the real property with a Trust Deed in the amount of $92,000.00.

23. Plaintiff reposed trust and confidence in Defendant in entering into the Agreement and in advancing $101,000 to Defendant; and Defendant knew it.

24. It was the intention of the parties, on December 1, 1978, to place Defendant in a fiduciary relationship, as to Plaintiff, and Defendant knew and understood this.

25. Defendant cannot account for the $101,000 advanced by Plaintiff (except to the extent of the $75,775 actually used as a portion of the purchase price of the real property), and cannot account for the proceeds of any of the encumbrances he placed upon the real property (except to the extent that the proceeds of a given encumbrance were utilized to pay off prior encumbrances).

26. Both orally and in the Agreement, Defendant represented to Plaintiff that Defendant would hold the funds advanced by Plaintiff, together with any funds which Defendant might obtain by encumbering the real property, in a segregated manner to be used for the purposes of the real property only.

27. At the time Defendant made that representation, Defendant did not intend to comply with it, but in fact intended to commingle such funds with other funds, to convert such funds to Defendant's own use, and to misappropriate them.

28. Defendant did not disclose these intentions to Plaintiff, but rather, Defendant made the representations described in Paragraph 26 knowing that they were false

when made, intending to induce Plaintiff to rely upon them, and intending to deceive Plaintiff.

29. Plaintiff did rely upon them by advancing the $101,000 to Defendant, and Plaintiff's reliance was reasonable.

30. Plaintiff would not have advanced the $101,000 or any portion thereof, to Defendant, if Defendant had disclosed his true intentions.

31. Plaintiff was damaged by Defendant's misrepresentations in the amount of $101,000, as of December 1, 1978, plus interest and attorneys' fees as set forth below.

32. The fiduciary relationship between Plaintiff and Defendant arose upon the execution of the Agreement and Defendant's receipt of funds from Plaintiff and the fiduciary relationship was in effect at all material times thereafter.

33. Defendant's acts of commingling and misappropriation occurred after the fiduciary relationship had arisen; and the fiduciary relationship did not arise simply by reason of such acts.

34. Defendant's acts of commingling and misappropriation were wilful, malicious, and outrageous, and injured the property of Plaintiff, consisting of Plaintiff's $101,000 and Plaintiff's beneficial interest in the real property. This willfulness, malice, and outrageousness are aggravated by the knowledge which must be attributed to Defendant as a member of the bar, particularly as that knowledge relates to the duties of a fiduciary.

35. Defendant was not under duress or compulsion in executing the Agreement.

36. The transaction embodied in the Agreement was a real estate joint venture, in which Defendant was a

fiduciary as to funds which came into his possesseion; the transaction was not a loan from Plaintiff to Defendant.

37. Defendant did not obtain Plaintiff's consent to the encumbrances he placed upon the real property (except the last encumbrance of $92,000); nor to Defendant's use of the proceeds of those encumbrances for purposes other than the real property.

38. The attorneys' fees provision in the Agreement was intended by the parties to award attorneys' fees to the prevailing party, whether a dispute was ultimately resolved by arbitration or by litigation.

39. Plaintiff had paid or incurred attorneys' fees, through the time of trial, of $78,858.97; since then, Plaintiff has incurred additional fees of $12,985.00 plus liability to his attorneys for $1,808.86 for out-of-pocket expenses.

40. The evidence does not establish participation by Defendant Shari Galardi in the acts which render this indebtedness nondischargeable as to Defendant.

41. Plaintiff's damages are to be measured by the $101,000 originally invested. Attempting to measure his damages by the sale value of the real property is too speculative.

CONCLUSIONS OF LAW

1. Such of the foregoing Findings of Fact as may be deemed to constitute Conclusions of Law are hereby adopted as Conclusions of Law; and such of the following Conclusions of Law as may be deemed to constitute Findings of Fact are hereby adopted as Findings of Fact.

2. Any indebtedness of Shari Galardi to Plaintiff is dischargeable in bankruptcy.

3. The indebtedness of Defendant Lawrence J. Galardi and of Defendant Lawrence J. Galardi, a Professional Corporation is not dischargeable in bankruptcy for each and all of the following reasons:

a. It constitutes money and property obtained by false pretenses, false representations, and actual fraud.

b. It is for fraud and defalcation while acting in a fiduciary capacity, and for embezzlement.

c. It is for willful and malicious injury (conversion) by Defendant to the property of Plaintiff.

4. Plaintiff is entitled to attorneys' fees of $____ under his Agreement with Defendant, and such fees are also nondischargeable.

5. Plaintiff's actual damages under the Agreement are $101,000, plus interest at the legal rate from December 1, 1987, until the date Judgment is entered.

6. Plaintiff is entitled to an award of punitive damages of $10,000, which is not dischargeable in bankruptcy.

7. Plaintiff is entitled to his costs of suit herein, which are also nondischargeable. (Said costs are included in the attorneys' fees figure, above, and not taxed separately).

8. The transaction between Plaintiff and Defendant was a real estate joint venture, and not a loan.

9. Defendant did not sign the Agreement under economic compulsion and such unfairness as would entitle Defendant to rescission.

June 18, 1985

BARRY RUSSELL
United States Bankruptcy Judge

NOTICE OF ENTRY/CERTIFICATE OF MAILING

Notice is hereby given that the foregoing order/judgment was entered on the date stamped on the face of this document; that conformed copies were mailed to attorney for plaintiff and attorney for defendant; or if not represented by an attorney, then to plaintiff and defendant individually, and to other parties in interest as designated by this court.

DATED June 24, 1985

JACK L. WAGNER, CLERK
U.S. BANKRUPTCY COURT

LOUISE FITZPATRICK
Deputy Clerk

DECLARATION OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to this action. I am employed by the law firm of STUTMAN, TREISTER & GLATT PROFESSIONAL CORPORATION, 3699 Wilshire Boulevard, Los Angeles, California, 90010. On the date shown below, at the direction of a member of said firm, who is a member of the Bar of this Court, I served the within FINDINGS OF FACT AND CONCLUSIONS OF LAW; JUDGMENT on the person(s) listed below by placing a true copy(ies) thereof in an envelope(s) addressed as follows:

NAME AND ADDRESS

Max Rush, Esq., Sulmeyer, Kupetz, Baumann & Rothman, 615 South Flower Street, Suite 600, Los Angeles, CA 90017

and then by sealing the envelope(s) and depositing it (them) with first-class postage thereon fully prepaid, in the United States mail at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on the 22nd day of April, 1985.

LUCILA RALSTON

Lucila Ralston
Declarant

ANTHONY CASTANARES, a member of
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION
3699 Wilshire Blvd., Suite 900
Los Angeles, California 90010
Telephone: (213) 251-5100
and
LAW OFFICES OF RICHARD S. LERNER
9777 Wilshire Blvd., Suite 1000
Beverly Hills, California 90212
Telephone: (213) 274-0856
Attorneys for Plaintiff

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,
Debtors.

BERNIE LERNER,
Plaintiff,

v.

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,
Defendants.

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,
Plaintiffs,

v.

BERNIE LERNER,
Defendant.

JUDGMENT ON DISCHARGEABILITY

Bankruptcy No. LA 81-00606-BR.
Adversary No. LA 81-5204-BR
Consolidated Adversary No. LA 81-0656-BR

Date: March 20, 1985 Time: 9:30 A.M.
Place: Courtroom of the Honorable Barry Russell

Filed June 14, 1985, Clerk U.S. Bankruptcy Court, Central District of California, By ..... Deputy Clerk.

At Los Angeles, California, on this 14 day of June 1985.

This matter came on for trial before the Honorable Russell B. Seymour, United States Bankruptcy Judge, on January 24, 25, 26, and 31, 1984. The trial was completed and the matter fully submitted, but Judge Seymour left the Bench without deciding it. It was then submitted to the undersigned United States Bankruptcy Judge for further proceedings. It was set for retrial on November 13, 14, and 15, 1984. On the first of those dates, the parties and their attorneys appeared and announced their readiness. The Court inquired of the parties whether they would stipulate to permit the undersigned United States Bankruptcy Judge to review the trial transcript, the pleadings, the briefs, and the exhibits introduced, and to submit the matter for decision on that basis, with the Court reserving the right to call for such further evidence or argument as the Court deemed appropriate. The parties so stipulated in open court, and a further hearing was set for March 20, 1985. At that time, Plaintiff appeared by his counsel, Anthony Castanares, a member of Stutman, Treister & Glatt Professional Corporation and Defendants appeared by their counsel, Max Rush, Esq., a member of Sulmeyer, Kupetz, Baumann & Rothman. The Court requested that the parties, by their counsel, reaffirm their earlier stipulation to submit the matter to the undersigned United States Bankruptcy Judge on the basis set forth above. They did so. Having reviewed the pleadings, the briefs, the trial transcript, and the exhibits received in evidence, and having, this day, made and entered its Findings of Fact and Conclusions of Law, the Court makes the following Judgment.

It is ORDERED, ADJUDGED, AND DECREED, that Plaintiff Bernie Lerner have and recover judgment against Defendant Lawrence J. Galardi and against Defendant Lawrence J. Galardi Professional Corporation, jointly and severally, for actual damages in the amount of $101,000.00, plus interest from December 1, 1978, to the present date of $53,376.51; plus punitive damages of $10,000.00; plus attorneys' fees of $93,652.83; plus costs of 0; for a total sum of $258,029.34; plus interest thereon at the legal rate from this date until this Judgment is fully satisfied; and it is further

ORDERED, ADJUDGED, AND DECREED, that all sums owing under this Judgment are nondischargeable in bankruptcy.

June 14, 1985

BARRY RUSSELL

United States Bankruptcy Judge

DECLARATION OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to this action. I am employed by the law firm of STUTMAN, TREISTER & GLATT PROFESSIONAL CORPORATION, 3699 Wilshire Boulevard, Los Angeles, California, 90010. On the date shown below, at the direction of a member of said firm, who is a member of the Bar of this Court, I served the within FINDINGS OF FACT AND CONCLUSIONS OF LAW; JUDGMENT on the person(s) listed below by placing a true copy(ies) thereof in an envelope(s) addressed as follows:

NAME AND ADDRESS

Max Rush, Esq., Sulmeyer, Kupetx, Baumann & Rothman, 615 South Flower Street, Suite 600, Los Angeles, CA 90017

and then by sealing the envelope(s) and depositing it (them) with first-class postage thereon fully prepaid, in the United States mail at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California, on the 22nd day of April, 1985.

LUCILA RALSTON

Declarant

MAX H. RUSH, a Member of IRVING SULMEYER, ARNOLD L. KUPETZ, RICHARD BAUMANN & DON ROTHMAN, Members of SULMEYER, KUPETZ, BAUMANN & ROTHMAN, a Professional Corporation
Suite 600
615 South Flower Street
Los Angeles, California 90017
(213) 626-2311
Attorneys for Debtors

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, A Professional Corporation and SHARI J. GALARDI,
Debtors.

BERNIE LERNER,
Plaintiff,

vs.

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, A Professional Corporation and SHARI J. GALARDI,
Defendants.

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, A Professional Corporation and SHARI J. GALARDI,
Plaintiffs,

vs.

BERNIE LERNER,
Defendant.

NOTICE OF APPEAL

CHAPTER 7 NO. LA 81-00606-BR.
ADVERSARY NO. LA 81-5204-BR
CONSOLIDATED ADVERSARY NO. LA 81-0656-BR

Filed July 3, 1985, Clerk U.S. Bkcy Court Cent. Dist. of Calif. By ..... Deputy.

LAWRENCE J. GALARDI, Defendant, appeals to the District Court from the final judgment of the Bankruptcy Court entered in this Adversary Proceeding on June 24, 1985. The parties to the Judgment appealed from and the names and addresses of their respective attorneys are as follows:

BERNIE LERNER, Plaintiff, counsel ANTHONY CASTANARES, Stutman, Treister & Glatt, 3699 Wilshire Boulevard, Suite 900, Los Angeles, California 90010, and LAW OFFICES OF RICHARD S. LERNER, 9777 Wilshire Boulevard, Suite 1000, Beverly Hills, California 90212;

LAWRENCE J. GALARDI, Defendant, counsel MAX H. RUSH, Sulmeyer, Kupetz, Baumann & Rothman, 615 South Flower Street, Suite 600, Los Angeles, California 90017.

Dated: July 3, 1985

SULMEYER, KUPETZ, BAUMANN & ROTHMAN
Attorneys for Appellant

By: MAX H. RUSH
Max H. Rush

APPENDIX "D"

MAX H. RUSH, a Member of IRVING
SULMEYER, ARNOLD L. KUPETZ,
RICHARD BAUMANN & DON ROTHMAN
Members of SULMEYER,
KUPETZ, BAUMANN & ROTHMAN
a Professional Corporation
Suite 600
615 South Flower Street
Los Angeles, California 90017
(213) 626-2311
Attorneys for Debtors/Defendants

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re

LAWRENCE J. GALARDI, dba LAWRENCE J. GALARDI, A Professional Corporation, and SHARI J. GALARDI,
Debtors.

JOHN TAYLOR, an Individual JOHN TAYLOR, dba LONDON ELECTRIC COMPANY, and LONDON CONSTRUCTION, LIMITED, A California Corporation,
Plaintiff,

vs.

LAWRENCE J. GALARDI, dba LAWRENCE J. GALARDI, A Professional Corporation and SHARI J. GALARDI,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CHAPTER 7 NO. LA 81-00606-RS
CONSOLIDATED ADVERSARY NO. LA 81-0653-RS
NO. LA 81-5220-RS
Date: November 2, 3, & 4, 1983
Time: 9:30 O'Clock A.M.
Court: "G", 9th Floor
Filed December 12, 1983
Clerk, U.S. Bankruptcy Court, Central District of California, By A.L.G. (initialed) Bankruptcy Clerk.

The matter of the within Adversary Proceeding came on regularly for trial before the undersigned Bankruptcy Judge in Courtroom "G", 9th Floor, United States Courthouse, 312 North Spring Street, Los Angeles, California on November 2, 3, and 4, 1983.

Plaintiff appeared by counsel MARC ZEGAR; Defendants appeared through counsel SULMEYER, KUPETZ, BAUMANN & ROTHMAN by MAX RUSH; the Court determining that no Pre-Trial Order governed this proceeding, the parties made certain stipulations in open Court; witnesses were sworn and testified; the Plaintiff having rested; and the Defendants having made a Motion to dismiss under the provisions of F.R.C.P. 41(b), the Court makes the following Findings of Fact a .d Conclusions of Law;

FINDINGS OF FACT

1. On or about October 6, 1977 the parties entered into an Agreement (Plaintiff's Exhibit "1" herein).

2. At all times relevant hereto LAWRENCE J. GALARDI was the owner of the real property referred to in Plaintiff's Exhibit "1".

3. At the time of said Agreement, a First Trust Deed existed in the principal amount of approximately $100,000.00.

4. At the time of the execution of the Agreement (Plaintiff's Exhibit "1") Plaintiff LONDON ELECTRIC COMPANY, transmitted $15,000.00 to Lawrence J. Galardi and thereafter an additional $70,000.00, all in accordance with the Agreement.

5. The "red" writing on Plaintiff's Exhibit "1" was placed thereon by John Taylor after he executed the Agreement and following a discussion with his attorney, RICHARD LERNER. The writing in "red" is not a part

of the Agreement. The other hand-written contents of Exhibit "1" was negotiated between the parties prior to the execution of the Agreement and it is a part of the Agreement.

6. At all times relevant hereto Lawrence J. Galardi was an attorney at law duly admitted to practice in California. The Agreement, Plaintiff's Exhibit "1", was drafted by him. At no time relevant hereto was Lawrence J. Galardi attorney for any of Plaintiffs and he never so acted.

7. On or about May 1, 1978, Plaintiffs and Defendant Lawrence J. Galardi entered into a Building Construction Contract (Defendant's Exhibit "A" herein).

8. Substantial costs of construction were disbursed directly through payments from TOKAI BANK. Plaintiff's Exhibit "2" is a disbursement sheet of payments from Tokai Bank.

9. The cost of construction as of July, 1980 is in the amount of not less than $732,139.00.

10. From the time of execution of this Agreement until February 15, 1980, the Debtor borrowed the principal sum of $1,300,000.00 secured by the subject real property. There is other property securing the first $800,000.00 of such loans.

11. The Debtor used loan proceeds as hereinabove stated, secured by the subject real property for purposes other than the construction and improvement of said property.

12. The construction has not been completed. There are no profits under the terms of the Agreement.

13. Few if any improvements were made to the property by the Debtor after July, 1980.

14. At the time the parties entered into the Agreement, Plaintiff's Exhibit "1", Lawrence J. Galardi represented to John Taylor that Plaintiffs would be paid pursuant to the terms of said Agreement from the proceeds of the sale of the subject real property.

15. Plaintiffs offered no evidence that the named Defendant, SHARI J. GALARDI, was involved in, participated in, or was connected in any way whatsoever directly or indirectly with the transaction alleged in this Adversary Proceeding.

16. To the extent that the following Conclusions of Law are Findings of Fact, in whole or in part, they are adopted as Findings of Fact to that extent.

CONCLUSIONS OF LAW

1. To the extent the foregoing Findings of Fact are conclusions of law, in whole or part, they are adopted as Conclusions of Law.

2. This Court has jurisdiction over the subject matter of this Complaint to the extent of issues of dischargeability under 11 U.S.C. Section 523.

3. Paragraphs 10 and 11 of the Agreement, Plaintiff's Exhibit "1", provide for Plaintiffs to agree at some future date to act as general contractor for a reasonable contractor's fee in the construction of the premises situated on the real property. The parties thereafter entered into such an Agreement; specifically the Building Construction Contract, Defendants' Exhibit "A".

4. Paragraph 12 of said Agreement, Plaintiff's Exhibit "1", provides that Plaintiffs would act as a subcontractor to provide electrical services at 28890 Selfridge Drive, Malibu, California.

5. Plaintiff's Exhibit "1" was not entered into specifically for the purpose of providing working capital for the construction and development of the real property commonly known as 20600 Eagle Pass Drive, Malibu, California as contended by Plaintiff.

6. Neither John Taylor nor any other Plaintiff had or has an equitable interest in the subject real property by virtue of Plaintiff's Exhibit "1", or otherwise.

7. The encumbering of the subject real property and the use of proceeds therefrom by the Debtor for purposes other than the construction and improvement of the subject real property was not a misappropriation of money or property or the conversion of any property interest of Plaintiffs or any of them.

8. The use of proceeds from encumbering the real property by the Debtor was not a willful and malicious injury to the interests of Plaintiffs, or any of them, or to any property interests of Plaintiffs, or any of them.

9. The use of proceeds from encumbering the real property for purposes other than the construction and improvement of the subject real property was not a conversion or embezzlement or larcenous taking of any property interests of Plaintiffs, or any of them.

10. Defendants did not willfully or fraudulently convert or embezzle or larcenize the fair rental value of the property when Defendants used said property as their personal residence.

11. The claims of Plaintiff are dischargeable under 11 U.S.C. Section 523(a)(2)(A).

12. The claims of Plaintiffs are dischargeable under 11 U.S.C. Section 523(a)(4).

13. The claims of Plaintiffs are dischargeable under 11 U.S.C. Section 523(a)(6).

Dated: December 12, 1983.

RUSSELL B. SEYMOUR

Russell B. Seymour,
Bankruptcy Judge

APPENDICES E and F
(Not Used)

APPENDIX "G"

File Closed/Dismissed

CASE NO. CC-85-1133

GENERAL DOCKET

UNITED STATES BANKRUPTCY
APPELLATE PANELS
OF THE NINTH CIRCUIT

IN RE LAWRENCE J. GALARDI,
LAWRENCE J. GALARDI, A Professional Corporation,
and SHARI J. GALARDI,
Debtors.

BERNIE LERNER,
Plaintiff/Appellee,
vs.
LAWRENCE J. GALARDI, LAWRENCE J. GALARDI
A Professional Corporation, and SHARI GALARDI,
Defendants/Appellants.

MAX H. RUSH
SULMEYER, KUPETZ, BAUMANN & ROTHMAN
A Professional Corporation
615 S. Flower St., Suite 600
Los Angeles, CA 90017
(213) 626-2311
Attorneys for Appellant

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI
A PROFESSIONAL CORPORATION, AND SHARI GALARDI,
Plaintiffs/Appellants,
vs.
BERNIE LERNER,
Defendant/Appellee.

ANTHONY CASTANARES
STUTMAN, TREISTER & GLATT
3699 WILSHIRE BLVD., SUITE 900
LOS ANGELES, CA 90010
(213) 251-5145
Attorneys for Appellee

No. Below: LA 81-00606 BR. Adversary No. Below: LA 81-5204-BR and LA 81-0656BR. Judge Below: Barry Russell. Date of Judgment Below: June 24, 1985. Notice of Appeal Filed: July 3, 1985.

Bankruptcy Appellate Panels of the Ninth Circuit, A True Copy Attest: James Dunlevy, Clerk. By Deputy Clerk, Robert J. Walker.

CASE NO. CC-85-1133

GENERAL DOCKET
UNITED STATES BANKRUPTCY
APPELLATE PANELS
OF THE NINTH CIRCUIT

In re LAWRENCE J. GALARDI

Date	Filings — Proceedings	Filed
7/8	(1) Transmittal Form & Notice of Appeal	
7/8	(2) Ltr to Attys Re BAP Rules	
7/8	(3) Ltr to Bk Ct Re Stmt of Issues & Cert of Record	
8/13	(4) Ltr from Bkcy Ct that no Stmt of Issues or Transcript has been Filed	
9/10	(5) Ltr. to Attys. No Designation & Statement of Issues Filed. Dismissal Order will be Entered in 10 Days.	
3-10-86	Memo re failure of A'ant to respond to Not. of Proposed Dismissal to Judges Abrahams and Volinn — JAS	
3/19	(6) Aplt's opening brief (0 4 copies) — eg	3/19
4/14	MEMO to Judge V (cc to Judge Ab) re next step to take — eg	
4/18	(7) Aple's MOTION to strike aplt's opening brief & to establish schedule for further briefing & for sanctions — eg	4/18
	FWDED to Judges Ab V — eg	
4/23	(8) ORDER — CASE DISMISSED — eg	4/23
	**** FILE CLOSED ****	

BANKRUPTCY APPELLATE PANELS
OF THE NINTH CIRCUIT

A True Copy
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APPENDIX "H"

No. 85-1133

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

BERNIE LERNER,
Plaintiff-Appellee,

v.

LAWRENCE J. GALARDI,
LAWRENCE J. GALARDI, a Professional Corporation and
SHARI J. GALARDI,
Defendants-Appellants.

LAWRENCE J. GALARDI,
LAWRENCE J. GALARDI, a Professional Corporation and
SHARI J. GALARDI,

v.

BERNIE LERNER.

BEFORE: THE BANKRUPTCY APPELLATE PANEL

ON APPEAL FROM THE BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LA-81-5204 BR LA-81-0656 BR
Filed October 21, 1986, (Initialed) Clerk, U.S. Bkcy. App. Panels or the Ninth Circuit.

MOTION FOR ORDER VACATING ORDER DISMISSING APPEAL

LAWRENCE J. GALARDI, Esq.
904 Silver Spur
Suite 291
Rolling Hills, CA 90274
(213) 541-0749

No. 85-1133

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CENTRAL DISTRICT OF CALIFORNIA

BERNIE LERNER,
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MOTION FOR ORDER VACATING ORDER DISMISSING APPEAL

STATEMENT

An order dismissing this appeal was entered on April 23, 1986 on the grounds that the Designation of Record and Statement of Issues were not filed.

The trial of this matter was concluded in January, 1984, before the Honorable Russell Seymour. Thereafter, Judge Seymour declined to decide the case and Judge Russell decided the case entering Findings of Fact and Conclusions of Law and Judgment thereon on June 24, 1985. This appeal is taken from said Findings and Conclusions and Judgment.

Appellants were represented by Max Rush, Esq., and the law firm of Sulmeyer, Kupitz, Baumann & Rothman at all times in the proceedings below. That firm filed a timely Notice of Appeal on July 3, 1985, and thereafter withdrew as counsel.

Appellants' Statement of Issues was filed on October 28, 1985 together with a Further Designation of Record, on that date. File-stamped copies are attached hereto as Exhibit "A" and as Exhibit "B." There are no copies in the court file. In the interim, counsel of record indicated that they would not further prepare and prosecute the appeal or have responsibility therefore.

Appellants' Opening Brief was filed on March 19, 1986. A copy of the first page bearing the file stamp is attached as Exhibit "C." Attached as Exhibit "C-1" is the Proof of Service.

Attached hereto as Exhibit "D" and "D-1" is a certified copy of the Court's Docket Sheet.

The Statement of Issues and the Designation of Record are not entered on the Docket. Both documents were filed during the period the court and court clerk's office were in the process of being moved to the Pasadena offices.

There are additional documents in the court file indicating this case, along with approximately 20 others, was "lost in the crack." (See memos in court file.) Appellant submits the Statements of Issues and Designation of

Record were not included in the court file because of confusion that existed at that time in the Bankruptcy Court Clerk's Office and because of the extremely large workload in the Appellate Panel's Clerk's office engendered by both new filings, pending business and the problems associated with moving to new quarters and the employment of new personnel.

Attached hereto as Exhibit "E" are copies of documents in the court file. (The Appellants' Opening Brief Docket entry #6 was not copied and attached because of its volume.)

Appellants are represented on appeal by Lawrence J. Galardi, Esq. Appellants' Opening Brief was submitted on March 19, 1986 because of a number of factors, among them:

a. The refusal of counsel of record to represent Appellants in the appeal;

b. The need to purchase and assimilate the entire record of trial and deal objectively with matters of fact and law wherein Appellants are intimately involved and no longer had the advantage of being represented by independent counsel with bankruptcy expertise.

In addition, delays have been occasioned by Appellants' need, on a continuing day-by-day basis, to meet Appellant, Lawrence J. Galardi's business, personal and private obligations in order to sustain himself and his family (undertaking a "fresh start") while this matter is appealed.

During the intervening period, Appellant completed a jury trial of four (4) weeks, a non-jury trial of five (5) weeks, a non-jury trial of three (3) days and has taken several thousands of pages of deposition testimony in

other cases, and voluminous written discovery and discovery of documents in cases for which Appellant is solely responsible.

Appellant has been unable to address the requirements of the within personal litigation because of these responsibilities and the responsibility of preparing for trial and trying cases involving the rights of his clients.

The additional requirements placed upon Appellant in preparation of the Brief has, from time to time, occasioned substantial stress and illness including partial loss of sight (central serous retinopathy) which has resulted in further delays in meeting the requirements for litigating this personal matter.

Rule 60 of the Federal Rules of Civil Procedure provides for relief from judgments or orders which in part involve clerical mistakes in either judgments, orders or "other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders. During the pendency of an Appeal, such mistakes may be so corrected before the Appeal is docketed in the Appellate Court, and thereafter while the Appeal is pending may be so corrected with leave of the Appellate Court." *F.R.C.P.60(a)*.

The Court may grant relief from a judgment or order "on motion and upon such terms as are just . . . (6) (for) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . ." *F.R.C.P.60(b)*.

Where Federal Rules of Civil Procedure Rule 60 et. seq. provides for relief from final judgment for "any other reason justifying relief," Appellant respectfully submits that rule is properly invoked when there are, as here, extraordinary circumstances or where the judgment, as here, may work an extreme and undue hardship. In all cases where the interests of justice are better served, it is appropriate for the Court to vacate orders or judgments under F.R.C.P. Rule 60 et. seq. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, (1974), 500F.2d 808, 163 U.S. App. D.C. 140. In the case at hand the Appellant is not personally responsible for the delay or the loss of documents filed with the Clerk including the Statement of Issues and Designation of Record. And, where Appellant has proceeded with his Appeal after counsel has refused to proceed on his behalf, and Appellant has filed his opening brief, the Court is justified in reinstituting the Appeal and vacating its Order of Dismissal. To do otherwise would prevent Appellant from having a disposition of these claims on the merits and would constitute an exteme hardship and work an injustice. *Reif v. A.H. Robins Co.* (1981) 90 F.R.D. 526; *Compton v. Alton Steamship Co., Inc.* (1979) 608 F.2d. 96.

The rule of the Bankruptcy Appellate Panel permitting reconsideration of an order upon motion made within 10 days, Appellant respectfully submits, has no applicability here, since:

a. Appellant did not learn of the dismissal until more than one month after the order was entered;

b. did not learn that the filings were lost or misplaced until recently;

c. the Opening Brief was filed within a reasonable time after counsel had withdrawn and after the reporter completed the transcript;

d. the Opening Brief was filed and counsel for *Appellee* moved alternatively to establish a briefing schedule, and that occurred after the Order of Dismissal was entered indicating counsel for the Appellee had no knowledge of that, either; and,

e. there can be no prejudice to the parties and the interests of justice will be served if this matter is disposed of on the merits.

This motion is made on the basis of the within statement, the need to prevent hardship and in the interest of justice to permit the final disposition of these matters on the merits, and the declaration of Appellant, Lawrence J. Galardi, in support. The court is respectfully referred to Appellants' Opening Brief, regarding the basic unfairness involved in the entry of a judgment including among other things an award of punitive damages, by a Judge who has failed to decide issues of credibility.

Therefore, and in view of the foregoing, Appellants respectfully submit the order dismissing the appeal should be vacated in the interest of justice and an order re-instating the appeal and establishing a schedule for further briefs, should be entered.

DATED: October 20, 1986

Respectfully submitted,

/s/ LAWRENCE J. GALARDI

Lawrence J. Galardi
Attorney for Appellants

DECLARATION OF LAWRENCE J. GALARDI, APPELLANT IN THESE PROCEEDINGS IN SUPPORT OF APPELLANTS' MOTION FOR ORDER VACATING ORDER DISMISSING APPEAL

This case was tried in January of 1984 by Judge Seymour and was thereafter decided by Judge Russell six months later. Appellants were represented by bankruptcy counsel, Max Rush, Esq., and the law firm of Sulmeyer, Kupitz, Baumann and Rothman.

After a Notice of Appeal was filed on July 3, 1985, counsel advised that they would not prosecute the appeal further. Thereafter, Appellants filed their Statement of Issues and a Further Designation of Record, acquired the entire record and undertook to prepare the Opening Brief without the aid and assistance of experienced bankruptcy counsel.

During the intervening period, counsel for Appellants, Lawrence J. Galardi, the undersigned declarant, has tried two lengthy cases of five (5) weeks and four (4) weeks, respectively together with several shorter cases and has been required to take thousands of pages of deposition testimony in other cases in representing clients in the pursuit of rights and remedies, and voluminous written discovery and discovery of documents in those cases for which declarant is solely responsible.

Once the trial record was acquired, it was necessary for Appellant, Lawrence J. Galardi (declarant) who does not regularly practice before the Bankruptcy Court, to familiarize himself with the record and the law, as well, and specifically those sophisticated issues involving jurisdiction, non-dischargability claims and "punitive damage" awards. The special circumstances surrounding the fact that a 'Retired Annuitant' tried the case below, declined

to decide it presumably for jurisdictional reasons, and the case was thereafter decided by another judge without expanding the record, also presented special problems requiring coordination with bankruptcy counsel and an attempt to learn how and why Judge Seymour who continued to sit, did not decide the case.

In addition, delays have been occasioned by declarant's needs, on a continuing basis to meet his family, personal and business obligations in order to sustain himself and his family while this matter is prosecuted on appeal. Undertaking to develop Appellants' Opening Brief has, from time to time, occasioned substantial stress and illness as the issues involved declarant intimately and in that circumstance, the need to retain objectivity becomes and has become more stressful.

Appellants entire estate and assets were lost in the bankruptcy. Assets with an appraised value in excess of six (6) million dollars were involved in the estate.

The judgment entered by Judge Russell, was entered without taking any testimony on matters that are intrinsic to punitive damages issues, among them, issues of credibility. Appellants' counsel agreed to be bound by the record made before Judge Seymour for reasons of judicial economy and practical necessity, but, with the understanding that Judge Russell would expand the record as necessary once he read the record. Judge Russell could not fairly enter the Findings and Conclusions and Judgment appealed from without first resolving issues of credibility. That is especially true since his Findings and Judgment went far beyond the tentative decision announced by Judge Seymour on the last day of the trial after counsel made their final arguments.

Because of the nature of the trial record and the issues presented here on appeal, declarant respectfully requests the Appellate Panel vacate its order dismissing the appeal and re-instate the appeal requiring Appellee file his Answering Brief and permitting Appellants to reply. There will be substantial and inestimable prejudice to Appellants if they are not permitted to pursue this appeal.

This declaration is made under penalty of perjury in accordance with the laws of the State of California, at Los Angeles, California, on this 20th day of October, 1986.

/s/ LAWRENCE J. GALARDI

Lawrence J. Galardi
Declarant

PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California, I am over the age of 18 and not a party to the within action; my business address is: 21515 Hawthorne Blvd. Ste. 432, Torrance, CA 90503

On October 21, 1986, I served the foregoing document described as Motion for Order Vacating Order Dismissing Appeal on Interested Parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Anthony Castanares, Esq.
STUTMAN, TREISTER & GLATT
3699 Wilshire Blvd.,
Ste. 900
Los Angeles, CA 90010

Richard S. Lerner, Esq.
9777 Wilshire Blvd.,
Ste. 1009
Los Angeles, CA 90212

Max H. Rush, Esq.
SULMEYER, KUPITZ, BAUMANN & ROTHMANN
615 Flower Street
Los Angeles, CA 90017

Robinson, Wolas & Diamant
1888 Century Park East,
Ste. 900
Los Angeles, CA 90067

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Torrance, California.

Executed on October 21, 1986, at Torrance, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on _____, 19___, at _____, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed by a member of the bar of this court at whose direction the service was made.

Ann Kendall	/s/ANN KENDALL
Type or Print Name	Signature

No. 85-1133

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

BERNIE LERNER,
Plaintiff-Appellee,

v.

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BERNIE LERNER.

BEFORE: THE BANKRUPTCY APPELLATE PANEL

ON APPEAL FROM THE BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LA-81-5204 BR LA-81-0656 BR
Filed October 24, 1986, (Initialed) Clerk, U.S. Bkcy.
App. Panels of the Ninth Cir.

MEMORANDUM IN SUPPORT OF MOTION FOR ORDER VACATING ORDER DISMISSING APPEAL

LAWRENCE J. GALARDI, Esq.
904 Silver Spur
Suite 291
Rolling Hills, CA 90274
(213) 541-0749

STATEMENT

Appellants have moved for an Order Vacating An Order Dismissing the within Appeal. This Memorandum is submitted in support of that Motion.

Appellant's Statement of Issues and Further Designation of Record were filed on October 28, 1985. Those documents were lost or misplaced by the Clerk and neither are recorded as a docket entry. A file stamped copy of each has been attached as Exhibit "A" and Exhibit "B" to the moving papers. There is correspondence by the Clerk of the Panel to the Clerk of the Bankruptcy Court (Exhibit "D" page 5 of 11) requesting those documents be forwarded. The reporter's transcript of the proceedings below was ordered, however, the Clerk of the Bankruptcy Court advised the Clerk of the Appellate Panel that no Statement of Issues or transcript had been filed. (Exhibit "D-1"). That information was corrected as to the transcript (Exhibit "E" page 4 of 11) but no new information regarding the Statement of Issues and Designation of Record and no certification of Clerk's transcript was thereafter forwarded to the Appellate Panel.

The docket of the Appellate Panel is attached as Exhibit "C". In addition to the foregoing it reflects correspondence to counsel, Mr. Rush and Mr. Castenares. Attorney Lerner's name is omitted as one of Plaintiff-Appellee's counsel of record.

Appellee's motion to strike the opening brief and to establish a briefing schedule was filed on May 18, 1986. On May 23, 1986 an order was entered dismissing the Appeal for failure to file the Statement of Issues and Designation of Record and for failure to respond to a notice letter and conditional order of dismissal regarding

those filings. Presumably the notice letter was mailed to Sulmeyer, Kupetz, Bauman and Rothman, who represented Appellants in the trial below and to Stuttman, Treister and Glatt, trial counsel for Appellee. The Sulmeyer firm had advised Appellants they were unable to continue representation after the Notice of Appeal was filed. On March 19, 1985 Appellant Lawrence J. Galardi filed Appellants' Opening Brief. The brief sets forth the identity of the parties and the issues and argues the facts and the law. The brief also identifies all counsel including Attorney Lerner who has represented Appellee throughout.

Attorney Richard Lerner represented Plaintiff-Appellee, Bernie Lerner ("Mr. Lerner") at all times and represented contractor John Taylor, at all times. His representation and the roles of those parties and each of the Galardi properties is important to an understanding of the issues in this Appeal. The errors of fact and law in the findings, conclusions and judgment that are appealed from are set forth and agreed in Appellants' Opening Brief. The Argument herein set forth supports the reasons why this Appeal should proceed.

PROLOGUE

There was a time when Malibu real estate developers could do no wrong. Handsome houses were built. Astronomical interest rates were collected. Developers and lenders alike took unprecedented profits on highly leveraged deals. It was in this milieu that Mr. Galardi became a successful, credit worthy developer of estate residences.

Success seduced developers into more ambitious projects. Mr. Galardi purchased a house to remodel on Selfridge Drive ("Selfridge"), eight acres on Eagle Pass ("Eagle Pass") and another house on Eagle Pass Drive

for remodel. Then he purchased 29 acres of land on Cool Oak Way adjacent to his Eagle Pass property ("Big Rock"). There, he planned to build several houses.

More ambitious projects required more ambitious financing. Interest rates continued to climb and greater leveraging occurred.

Unprecedented profits also attracted new profit participants. Individuals came to expect double digit returns on monies loaned. Mr. Bernie Lerner ("Mr. Lerner"), Appellee, was not satisfied with the ten percent (10%) return allowed by the usury laws. For this reason, he was not interested in making a straight loan to Mr. Galardi.

The old caution that increased rates of return follow increased risks of loss became unimaginable, inconceivable. Losses were not contemplated by the parties and certainly not by the Lerners who believed we were in the biggest real estate boom the world has ever seen. As long as the cycle continued, everyone felt smart, successful and rich; and, no one complained.

Then economic conditions changed. Mr. Taylor, contractor on Eagle Pass, and one of Attorney Lerner's clients, did not pay Mr. Lerner promptly for $7,000 worth of carpet. Mr. Lerner thereafter questioned his transaction with Mr. Galardi as to Bonsall Drive in Malibu ("Bonsall"). Mr. Lerner called his brother, Attorney Richard Lerner ("Attorney Lerner") who had negotiated the Bonsall deal for the Lerners and who also represented Mr. Taylor, as aforesaid.

So began a series of lawsuits and a bankruptcy which culminated in a conversion of Mr. Galardi's Chapter 11 to a Chapter 7 liquidation. Mr. Taylor was the moving party. Both Mr. Taylor and Mr. Lerner filed suits for nondischargeability in addition to earlier filed suits in the

State Court. Neither Mr. Lerner nor Mr. Taylor were clients of Mr. Galardi, at any time. Both Mr. Lerner and Attorney Richard Lerner and contractor Taylor dealt with Mr. Galardi as an owner of property who was creditworthy and successful.

ARGUMENT

THIS LITIGATION

On behalf of his family business, Attorney Lerner filed suit against his client, Mr. Taylor, and Mr. Galardi, to recover $7,000 for the carpet installed at Eagle Pass. Attorney Lerner also filed two other State Court actions against Mr. Galardi. One was based on a Taylor/Galardi alleged partnership involving a three project agreement ("Three Project Agreement"). The other was based on an alleged Lerner/Galardi partnership involving the Bonsall agreement ("Bonsall Agreement"). Those cases were removed to the Bankruptcy Court. In the Lerner action, Attorney Lerner obtained Writs of Attachment on Bonsall, Eagle Pass and Big Rock and began to levy. In the Taylor action, Attorney Lerner filed lis pendens on Eagle Pass, Bonsall and Big Rock.

To prevent a trustee's sale of his Eagle Pass property, Mr. Galardi filed Chapter 11 Bankruptcy proceedings and attempted to refinance and reorganize using his equity in over 6.8 million dollars of real estate. 1.2 million dollars was owed against Eagle Pass and Big Rock. (The latter had been given as "additional security"). $542,000 was owed against Bonsall. ($92,000 in additional financing was added at the insistence of Attorney Lerner). Mr. Taylor forced Mr. Galardi into a Chapter 7 proceeding, thereafter.

Mr. Galardi's usecured creditors filed bankruptcy proceedings against a "Lerner-Galardi Partnership". The Bankruptcy Court dismissed the action based, in part, on Mr. Lerner's declaration that he was *not* Mr. Galardi's partner, only his lender. Those proceedings were before Judge Seymour who tried this case below and it was Judge Seymour who entered the Order of Dismissal.

Mr. Galardi's unsecured creditors filed bankruptcy proceedings against a "Taylor-Galardi Partnership". The Bankruptcy Court dismissed the action based, in part, on Mr. Taylor's declaration that he was not Mr. Galardi's partner, only his lender. Judge Seymour entered that Order of Dismissal.

Mr. Taylor's claims against Mr. Galardi based on the three project agreement were adjudicated in the Bankruptcy Court. The trial was before Judge Seymour. The Bankruptcy Court found that no partnership or joint venture existed between Mr. Taylor and Mr. Galardi and that no misconduct occurred because Mr. Galardi had the right to make loans on property he owned without accounting to Mr. Taylor. On that basis, the Bankruptcy Court discharged all of Mr. Taylor's claims against Mr. Galardi.

Mr. Lerner's claims against Mr. Galardi based on the Bonsall Agreement were later adjudicated in the Bankruptcy Court. In direct conflict with the dismissed "Lerner-Galardi Partnership" proceedings, the Bankruptcy Court found that a joint venture existed, that Lerner and Galardi were partners, and that misconduct occurred when Mr. Galardi encumbered Bonsall and used the loan proceeds for purposes not directly and immediately related to Bonsall without accounting to Mr. Lerner.

The Findings of Fact and Conclusions of Law entered by Judge Seymour in the Taylor v. Galardi action (LA-81-0653-RS and LA-81-5220-RS) are attached as Appendix "I" to Appellant's Opening Brief.

THE PROPERTIES

In order to fully understand the Bonsall affair, the understanding of the parties and how they intended to and in fact implemented that understanding, it is necessary to first review, albeit briefly, each of the parties and agreements and the loan history as it relates to Mr. Galardi's attempt to perform the obligation he had undertaken at every stage, even after the Attorney Lerner inspired interference by Mr. Lerner and Mr. Taylor was put in motion.

Attorney Lerner's client, Mr. Taylor made a loan to Mr. Galardi of $85,000 and entered into a three project agreement with Mr. Galardi. On the first project, Selfridge, Mr. Taylor agreed to be the electrical subcontractor. Mr. Taylor performed his contract and received his pay. Mr. Galardi sold Selfridge at a profit in January of 1979.

Mr. Taylor, in addition, by virtue of the three project agreement, agreed to build the first of several houses on the Big Rock property. He never did.

Mr. Galardi and Mrs. Galardi owned Big Rock.[1] Mr. Galardi used the Big Rock property in conjunction with

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[1]The case against Mrs. Galardi was dismissed in all respects at the conclusion of the trial below, with the acquiescence of Appellee's counsel, Mr. Castaneras. In the Taylor litigation, the findings and conclusions, Exhibit "I" to the Opening Brief, indicate Mrs. Galardi was dismissed at the close of the trial on the merits. Earlier Attorney Lerner had demanded and received a Quit Claim Deed from Mrs.

Eagle Pass, the adjacent property, to secure a series of loans used to develop Eagle Pass and to a lesser extent, Big Rock.

In the Spring of 1980 Mr. Galardi arranged for a loan of $3,000,000 secured by Big Rock, Eagle Pass and Bonsall for the purpose of paying off existing loans and providing construction funds for completing the Eagle Pass house and building houses at Bonsall and at Big Rock. In June of 1980 he received the first $250,000. That money paid off existing loans on Bonsall and Eagle Pass, according to plan.[2]

In August of 1980 Mr. Galardi expected to receive the next $800,000. Because of the lis pendens and writs of attachment obtained in the State Court actions by Attorney Lerner on behalf of his clients Mr. Lerner and Mr. Taylor, and levied on Mr. and Mrs. Galardi's three properties, the loans procured for Mr. Galardi were never funded.[3] Further attempts to borrow funds also failed, both prior to filing the Chapter 11 and subsequently to fund the proposed plan. After Mr. Taylor forced Mr. Galardi into a liquidation bankruptcy, Mr. Galardi lost the Big Rock property and Eagle Pass property by trustee's sale and foreclosure. He also lost the Bonsall property by foreclosure.

Galardi on Bonsall when he insisted that his client-brother Mr. Lerner enter into an agreement only with Appellant Lawrence J. Galardi Professional Corporation.

[2]The plan required Mr. Galardi to use his credit worthiness and other assets to secure sufficient funds for Bonsall as Bonsall was not of sufficient value to support the loans needed to build it out.

[3]Mr. Galardi refused Attorney Lerner's demands in July 1980 to exact money from him out of the loan funds and Attorney Lerner made good on his threats "to pull the rug out."

Attorney Lerner's client Mr. Taylor, as part of the three project agreement with Mr. Galardi, agreed to be the general contractor for Eagle Pass. He never completed the work.

Mr. Galardi considered the $85,000 as a loan from Mr. Taylor. Attorney Lerner filed spurious lawsuits and made spurious false claims seeking an equity interest in all of Mr. Galardi's properties on behalf of his client Mr. Taylor. In two separate bankruptcy proceedings the Bankruptcy Court agreed with Mr. Galardi — the $85,000 was a loan from Mr. Taylor to Mr. Galardi. The Bankruptcy Court concluded no misconduct occurred because Mr. Galardi had no obligation to do other than deal with his property and his funds borrowed on the basis of his properties and credit worthiness, as his own.

Returning now to the Bonsall property and the Bonsall agreement — in the Summer of 1987 Mr. and Mrs. Galardi opened an escrow to purchase Bonsall for $285,000. They arranged for a $200,000 loan from Great Western. They needed approximately $100,000 more in order to close the deal and replace out-of-pocket dollars and deal with current expenses. At about the same time Mr. Lerner told Attorney Lerner that he had $100,000 to invest.

Mr. Galardi asked Mr. Taylor if he wanted to provide a loan to Mr. Galardi, but, he had no funds available to lend, at that time. Mr. Taylor introduced Mr. Galardi to his attorney, Attorney Lerner. Attorney Lerner approached Mr. Lerner. Mr. Lerner knew of Mr. Galardi from Mr. Taylor to whom he had sold carpets, regularly.

Mr. Galardi wanted a loan. Mr. Lerner did not want a simple loan because he felt that the ten percent return allowed by the usury laws was inadequate. Attorney

Lerner negotiated a deal with Mr. Galardi on behalf of himself and Mr. Lerner.

Attorney Lerner received an exclusive real estate listing as part of the Bonsall agreement. Attorney Lerner also exacted $10,000 in conjunction with the deal, for himself. The Bonsall agreement does *not* provide for any such payment to Attorney Lerner. At the State Court Arbitration Hearing the following exchange occurred between Mr. Lerner and Attorney Lerner:

Bernie Lerner: "You never told me that you got $10,000 for this deal."

Richard Lerner: "Shut up, stupid."

The Bonsall agreement recites receipt of $100,000 by Mr. Galardi from Mr. Lerner. In fact, Mr. Lerner only gave Mr. Galardi $91,000 on December 1, 1978.[4]

Attorney Lerner at all times negotiated on behalf of Mr. Lerner. He included the attorney-client relationship language over Mr. Galardi's objection and he stated that he would not advance the funds unless the lawyer-client relationship language was included and he specifically made threats with regard to Mr. Galardi's license to practice law. It is clear Mr. Galardi did not "bargain" for the Lerner-Galardi agreement.

Query why this acrimonious relation continued, but it did.

Both attorneys signed the Bonsall agreement. Attorney Lerner gave Mr. Lerner's $91,000 check payable to Mr. Galardi's Trust Account to Mr. Galardi. Immediately thereafter, Attorney Lerner accompanied Mr. Galardi to

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[4]He did not pay Mr. Galardi the additional $10,000 until several months later.

the bank where the check was deposited for collection and immediately withdrawn. Mr. Galardi used some of the money to close escrow on Bonsall. $76,775 was delivered by Mr. Galardi to escrow as the balance of the down payment together with $5,233 in escrow fees. The brokerage commission was $13,680, and it was paid at a later date. A first trust deed of $200,000 was recorded at the time escrow closed in favor of great western.

Mr. Galardi obtained a series of loans secured by the Bonsall property in addition to the loans hereinabove described with regard to his other properties. Mr. Galardi told the Lerners about all loans at all times. There is nothing in the Bonsall agreement that requires written consent by Mr. Lerner. Mr. Galardi negotiated the $60,000 loan months before he entered into the Bonsall agreement. Mr. Lerner knew about the $60,000 loan and did not object. Mr. Lerner knew about the $50,000 loan and did not object. In December of 1979 or January of 1980, Mr. Lerner obtained the exact loan figures from Mr. Galardi and took a full tax write-off for those loans on his personal tax return. Surely that constituted consent to all prior loans even absent the other evidence of knowledge and consent.

On June 19, 1980 Mr. Galardi met with Mr. Lerner and discussed the $250,000 loan which was funded on June 25, 1980 and also discussed and itemized the costs of construction, thus far (over $68,000). That loan released Bonsall from the earlier loan which Mr. Lerner testified he had not consented to. That loan, given the timing of the $250,000 funding, was not a "further encumbrance" without Mr. Lerner's consent even under Mr. Lerner's view of the facts as testified to below. That loan reduced the total amount secured by Bonsall and it would have been "unreasonable" not to consent per the language of the Bon-

sall agreement, if it is to be relied upon, had Lerner withheld his consent.

As of July 1980 the total encumbrances on Bonsall were $450,000. Mr. Galardi used part of the $250,000 loan to pay off a mortgage on Eagle Pass permitting the borrowing of the next phase of the $3,000,000 loan for use at Bonsall, according to plan. The remaining $100,000 released Bonsall from the earlier loan which in turn had paid off the $60,000 and $50,000 loans. (Thus reducing debt from $110,000 to $100,000). Contrary to the findings below the $250,000 loan cured any possible misconduct associated with the use of proceeds from the prior loans, assuming Appellee's position arguendo, and contrary to the findings of misappropriation in the Court below.

The findings below that Mr. Galardi "cannot" account for the $101,000 and "cannot" account for the proceeds of any of the encumbrances placed against Bonsall are clearly erroneous. All but approximately $12,000 — the broker's commission — was not included in the figures given to Mr. Lerner. The broker's commission was later paid. In addition, the findings below that Bonsall has been "over encumbered" as of June 1980 are not supported. Bonsall had a fair market value of $660,000 with loans totalling $450,000. The evidence indicates the practice of encumbering properties up to 70% of their value was not unreasonable in those circumstances.

The finding below that the Bonsall agreement created a partnership/joint venture is inconsistent with the finding that there was no attorney-client relationship and inconsistent with Mr. Lerner's declaration filed in the Bankruptcy Court wherein he stated, "I agreed to lend Lawrence J. Galardi the sum of $101,000 . . . I have never at any time held myself out as Lawrence J. Galardi's partner."

The attorney-client recitals and the $101,000 receipt recital are rejected below.

There is no basis in the evidence to take the partnership-joint venture recital at face value, especially, in view of Mr. Lerner's declarations to the contrary.[5]

The Issues as set forth in the Statement filed October 28, 1985 clearly established the Issues on appeal. It is clear from the foregoing that there is an essential factual circumstance that was not perceived below but would have been apparent had the Court focused on the credibility of the witnesses on those matters where there was conflicting testimony and evidence, namely, whether the Lerners improperly demanded an equity interest in Mr. and Mrs. Galardi's properties after they learned of the $3,000,000 loan that had been arranged. Their greed surfaced and Mr. Galardi refused to be extorted by the specious threats and claims of "partnership."

Mr. Lerner was quite willing to accept the benefits of loans secured by all of Mr. Galardi's properties. He took the tax benefits of the loans which he later contrived to question. Until July of 1980 he have Mr. Galardi no reason to believe that he objected to Mr. Galardi's standard operating procedure. Mr. Galardi met with him, and his brother and discussed Bonsall, the scope of the construction and the loans. According to Attorney Lerner Mr. Galardi was to obtain all financing based on his credit worthiness and pay all costs of the money he borrowed using all of his properties. The Bonsall agreement made no provision for losses. Mr. Galardi never asked Mr.

---

[5]Judge Russell did not observe the lack of credibility of the Lerners on these issues and others wherein there was conflicting evidence. The punitive awards and the non-dischargeability findings are simply not supported in the record and are not supportable.

Lerner to establish his credit worthiness or to provide any security and Mr. Galardi viewed all of the loans as his sole responsibility.

To the bitter end Mr. Galardi tried to obtain enough financing to complete the Bonsall project successfully. Once Attorney Lerner filed the lis pendens and levied on the writs of attachment in August of 1980, however, Mr. Galardi could not obtain further financing, regardless of the value of the Bonsall property.

CONCLUSION

For all of the reasons hereinabove argued and considering the importance of the matters set forth in the Statement of Issues filed on October 28, 1985; and for the reasons set forth at length in the opening Brief filed March 19, 1986, Appellants respectfully submit the Panel should reinstate the Appeal vacating its earlier Order of May 23, 1986.

In these circumstances, the interests of justice require an adjudication on the merits and an opportunity to reverse the judgment appealed from.

Dated: October 24, 1986

Respectfully submitted,

/s/ LAWRENCE J. GALARDI
Lawrence J. Galardi
Attorney for Appellants

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California, I am over the age of 18 and not a party to the within action; my business address is: 21515 Hawthorne Blvd. Ste. 432, Torrance, CA 90503

On October 21, 1986, I served the foregoing document described as Motion for Order Vacating Order Dismissing Appeal on Interested Parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Anthony Castanares, Esq.
STUTMAN, TREISTER & GLATT
3699 Wilshire Blvd.,
Ste. 900
Los Angeles, CA 90010

Richard S. Lerner, Esq.
9777 Wilshire Blvd.,
Ste. 1009
Los Angeles, CA 90212

Max H. Rush, Esq.
SULMEYER, KUPITZ, BAUMAN & ROTHMAN
615 Flower Street
Los Angeles, CA 90017

ROBINSON, WOLAS & DIAMANT
1888 Century Park East,
Ste. 900
Los Angeles, CA 90067

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Torrance, California.

Executed on October 21, 1986, at Torrance, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on _____, 19__, at _____, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

ANN KENDALL	/s/ANN KENDALL
Type or Print Name	Signature

APPENDIX "I"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re the appointment of

RUSSELL B. SEYMOUR,
Bankruptcy Judge, at
Los Angeles, California,
as a reemployed annuitant.

ORDER OF THE CHIEF JUDGE

On behalf of the above entitled Court and pursuant to Section 40(d)(2) of the "Bankruptcy Act" and Section 404(d) of Public Law 95-598.

It is hereby ORDERED that Russell B. Seymour be and he is hereby reappointed, effective November 15, 1982, as a full-time Bankruptcy Judge for the Central District of California for the express purpose of presiding over Bankruptcy Judge Moriarty's caseload presently before this Court; and such appointment shall remain in effect until further order of the court; and Russell B. Seymour shall serve as a reemployed annuitant at the salary authorized by Section 40(d)(2) of the "Bankruptcy Act."

Said Russell B. Seymour shall have his official headquarters at Los Angeles, California, and may hold court at places designated by the Judicial Conference of the United States and at such other places as may be necessary and convenient.

DATED: November 12, 1982.

/s/ ROBERT J. KELLEHER
Robert J. Kelleher
Acting Chief Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re the appointment of

RUSSELL B. SEYMOUR,
Bankruptcy Judge, at
Los Angeles, California,
as a reemployed annuitant.

ORDER OF THE CHIEF JUDGE

Filed January 13, 1982, Clerk, U.S. Bkcy. Court, Cent. Dist. of Calif. By ..... Deputy.

On behalf of the above entitled Court and pursuant to Section 40(d)(2) of the "Bankruptcy Act" and Section 404(d) of Public Law 95-598.

It is HEREBY ORDERED THAT RUSSELL B. SEYMOUR be and he is hereby extended as full-time Bankruptcy Judge for the Central District of California from January 15, 1982 through March 6, 1982, to serve as a reemployed annuitant at the salary authorized by Section 40(d)(2) of the "Bankruptcy Act".

Said RUSSELL B. SEYMOUR shall have his official headquarters at Los Angeles, California, and may hold Court at places designated by the Judicial Conference of the United States and at such other places as may be necessary and convenient.

DATED: November 13, 1982.

/s/ A. ANDREW HAUK
A. Andrew Hauk
Chief Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re the appointment of
RUSSELL B. SEYMOUR,
Bankruptcy Judge, at
Los Angeles, California,
as a reemployed annuitant.

ORDER OF THE CHIEF JUDGE

Filed June 10, 1982, Clerk, U.S. Bkcy. Court Cent. Dist. of Calif. By ..... Deputy.

On behalf of the above entitled Court and pursuant to Section 40(d)(2) of the "Bankruptcy Act" and Section 404(d) of Public Law 95-598,

IT IS HEREBY ORDERED THAT RUSSELL B. SEYMOUR be and he is hereby reappointed, effective June 12, 1982, as a full-time Bankruptcy Judge for the Central District of California for the express purpose of presiding over the Beverly Hills Bancorp case presently before this Court; and, such appointment shall remain in effect until said judicial proceeding is concluded; and, that RUSSELL B. SEYMOUR shall serve as a reemployed annuitant at the salary authorized by Section 40(d)(2) of the "Bankruptcy Act".

Said RUSSELL B. SEYMOUR shall have his official headquarters at Los Angeles, California, and may hold Court at places designated by the Judicial Conference of the United States and at such other places as may be necessary and convenient.

DATED: June 10, 1982

/s/ A. ANDREW HAUK
A. Andrew Hauk
Chief Judge

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re the appointment of

RUSSELL B. SEYMOUR,
Bankruptcy Judge, at
Los Angeles, California,
as a reemployed annuitant.

ORDER OF THE CHIEF JUDGE

On behalf of the above entitled Court and pursuant to Section 40(d)(2) of the "Bankruptcy Act" and Section 404(d) of Public Law 95-598,

IT IS HEREBY ORDERED that Russell B. Seymour be, and he is, hereby reappointed, effective February 9, 1984 as a part-time Bankruptcy Judge for the Central District of California for the express purpose of presiding over certain Bankruptcy matters presently pending before him and this Court; and that such appointment shall remain in effect through March 31, 1984 or until further order of the Court; and Russell B. Seymour shall serve as a reemployed annuitant on a per diem basis as needed.

Said Russell B. Seymour shall have his official headquarters at Los Angeles, California and may hold Court at places designated by the Judicial Conference of the United States and in such other places as may be necessary and convenient.

DATED: February 9, 1984

/s/ MANUEL L. REAL
Manuel L. Real
Chief Judge

BURKE, WILLIAMS & SORENSEN
Martin J. Burke
Richard R. Terzian
Dennis P. Burke
707 Wilshire Blvd.,
Suite 3309
Los Angeles, California 90017
(213) 485-0101
Attorneys for Trustee

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In the Matter of
BEVERLY HILLS BANCORP,
a California corporation,
Debtor.

In Proceedings for Reorganization
of a Corporation (Chapter X)
No. BK 74-4409 JWC (RBS)

ORDER WITHDRAWING REFERENCE; AND ORDER APPOINTING SPECIAL MASTER PURSUANT TO RULE 53 AND SECTION 117 OF THE ACT

Filed April 16, 1984, Clerk, U.S. Bankruptcy Court, Central District of California
By ..... Deputy Clerk.

At Los Angeles, in said District, this 16th day of April, 1984;

It appearing that by Orders of this Court dated March 1, 1978 and March 6, 1978, all proceedings with respect to the above-named Debtor were referred to the Honorable James E. Moriarty and to the Honorable Russell B. Seymour as Bankruptcy Judges; and

It appearing that by Order of this Court dated November 18, 1982, all matters with respect to these proceedings were referred solely to Bankruptcy Judge Russell B. Seymour following the death of Bankruptcy Judge James E. Moriarty; and

It appearing that said reference should now be withdrawn because of the retirement of Russell B. Seymour as a Bankruptcy Judge; and

It appearing that commencing on October 29, 1982, Bankruptcy Judge Russell B. Seymour conducted extensive hearings with respect to a complex plan of reorganization submitted by the Trustee on September 28, 1982, and a competing complex plan of reorganization submitted by a group of shareholders of Beverly Hills Bancorp on January 4, 1983, and that during said hearings each of said competing plans was the subject of numerous significant amendments, and that on June 16, 1983, Bankruptcy Judge Russell B. Seymour determined conditionally that each competing plan was fair and equitable, and that following further hearings on additional modifications to said plans Bankruptcy Judge Russell B. Seymour on March 30, 1984, again determined that each of said plans was fair and equitable and directed that there be submitted for review and approval the voluminous material to be mailed to the approximately 2,500 shareholders for their vote on said competing plans, and that the proponents of said plans are presently engaged in preparing said material; and

It appearing that additional Court review and approval must be obtained with respect to the satisfaction of the conditions imposed by Bankruptcy Judge Seymour in approving the plans prior to their submission to the shareholders; and

It appearing under these exceptional circumstances that a special master possessing firsthand knowledge of the history and complex issues involved in these proceedings would greatly facilitate this Court's final review and approval for submission to the shareholders of the competing plans and the ultimate closing of these proceedings;

NOW, THEREFORE, IT IS HEREBY ORDERED that the reference of this proceedings to Russell B. Seymour as Bankruptcy Judge pursuant to Order dated November 18, 1982, is hereby withdrawn; and

IT IS FURTHER ORDERED that Russell B. Seymour is hereby appointed as Special Master to assist this Court pursuant to Rule 53 of the Federal Rules of Civil Procedure and Section 117 of the Bankruptcy Act, and there is hereby referred to him as Special Master all remaining matters in these proceedings until further order of this Court; and

IT IS FURTHER ORDERED that the Special Master shall file with this Court all reports as required pursuant to Local District Court Rule 25.11; and

IT IS FURTHER ORDERED that Russell B. Seymour, as Special Master, shall be paid at a rate of $250 per day, which compensation is hereby determined to be fair and reasonable, together with reasonable expenses, to be paid monthly by the Trustee out of the funds from the Debtor's estate, subject to approval by this Court; and

IT IS FURTHER ORDERED that all filings with respect to this case shall continue to be filed in the United States Bankruptcy Court, Central District of California.

/s/ JESSE W. CURTIS

Jesse W. Curtis
United States District Judge

APPENDIX "J"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOCAL RULE GOVERNING BANKRUPTCY CASES AND PROCEEDINGS

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ____U.S.____, 102 S.Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the District Court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in Section 241(a) of the Bankruptcy Act of 1978; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the District Court's assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

Bankruptcy cases and related proceedings shall be filed with the Bankruptcy Clerk and assigned to bankruptcy

judges, including those matters to be reviewed by a District Court Judge.

In all pleadings after referral by a bankruptcy judge to a District Court Judge, the caption shall contain the following notice: "REFERRED TO U.S. DISTRICT COURT".

The court of bankruptcy constituted by Section 404 of the Bankruptcy Act of 1978 shall continue to be known as the United States Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the District Court, except that a judgment by the District Judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules. Upon reference to a United States District Judge the moving party shall give notice to affected parties, advising them of the requirement that subsequent pleadings shall identify the District Judge to whom the matter has been referred.

The moving party shall also provide the District Court with a list of the names and addresses of all parties served.

In any matter to be heard before a District Judge under these Rules, the Local Rules of the District Court must be strictly complied with, including the requirement that documents presented for filing must be accompanied by a legible copy for the use by the District Judge. The Clerk of the Bankruptcy Court is authorized to reject any filing which does not comply with the requirement of this Local Rule.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn at any time by the District Court on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the District Court. If a reference is withdrawn, the District Court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a District Judge in accordance with the court's usual system for assigning civil cases.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt —

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a District Judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a District Judge.

(3)(A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a District Court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate, proceedings to lift the automatic stay; counterclaims by the estate in whatever amount against persons filing claims against the estate; proceedings to set aside preferences and fraudulent conveyances; orders to turn over property of the estate; orders authorizing use of cash collateral; orders approving the sale of property of the estate free and clear of liens; allowance or denial of discharge; proceedings to determine the dischargeability of a debt; proceedings regarding the confirmation of a plan; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings, and wherever the bankruptcy judge determines that circumstances require that a judgment or order be entered by a District Judge, the bankruptcy judge shall not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the District Judge, unless

the parties to the proceeding consent to entry of judgment or order by the bankruptcy judge.

(c) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within ten (10) days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order, Modification by the District Judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules. The procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders except that:

(A) The provisions of Sections (e)(2)(A) and (e)(2)(B) of this rule shall apply;

(B) The procedural modifications set forth in Bankruptcy Interim Rule 8004 shall apply pertaining to applications for leave to appeal interlocutory orders; and

(C) The form and contents of record on appeal shall comply with Rules 4(b) and 9(a) and (b) of the Rules of the United States Bankruptcy Appellate Panels of the Ninth Circuit.

(2) (A) A District Judge shall review:

(i) an order or final judgment entered under Section (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order of final judgement entered under Section (d)(2) if the bankruptcy judge certifies that circumstances require that the order or judgment be approved by a District Judge, whether or not the matter was

controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under Section (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the District Judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment or proposed order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the District Judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a District Judge of any matter subject to review under Section (e)(2), the District Judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise prior to the time of the entry of the order or judgment of the District Judge after review the issue whether the bankruptcy judge should have entered a proposed judgment or order under Section (d)(3) rather than an order under Section (d)(2).

(5) The provisions of 11 U.S.C. § 363(m) and § 364(e) are incorporated by reference into these rules to apply to any action taken in good faith pursuant to an order of the bankruptcy judges.

(f) Local Rules

In proceedings before a bankruptcy judge the Local Rules of the Bankruptcy Court shall apply. In proceed-

ings before a District Judge, the Local Rules of the District Court shall apply.

(g) Bankruptcy Rules and Title IV of the Bankruptcy Act

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of the Bankruptcy Act of 1978 as amended and by the Bankruptcy Rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. § 2075 and limited by Section 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with this rule and the holding of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ___U.S.___, 102 S.Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1899, as amended, and filed on or after October 1, 1979. Any bankruptcy matters pendings before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

I. Preliminary Matters

1. *Emergency Resolution*[(a)]

The purpose of this rule is to supplement existing law and rules in respect to the authority of bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Piple Line Co.*, ___U.S.___, 102 S.Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the District Court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power of bankruptcy judges in Section 241(a) of the Bankruptcy Act of 1978; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the District Court's assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

2. *The Bankruptcy Court is Alive and Well* [(b) 3rd ¶]

The court of bankruptcy constituted by Section 404 of the Bankruptcy Act of 1978 shall continue to be known as the United States Bankruptcy Court of this district.

APPENDIX "K"

LAWRENCE J. GALARDI
904 Silver Spur Rd.
Suite 291
Rolling Hills, California 90274
(213) 214-2289
Attorney for Appellants

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BAP No. 85-1133

In re

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,

Debtors.

BERNIE LERNER,

Plaintiff,

v.

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,

Defendants,

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI, a Professional Corporation and SHARI J. GALARDI,

Plaintiffs,

v.

BERNIE LERNER,

Defendant.

STATEMENT OF ISSUES

Bankruptcy No. LA 81-00606-BR,
Adversary No. LA 81-5204-BR,
Adversary No. LA 81-0656-BR

Filed: October 28, 1985, Clerk, U.S. Bkcy. Court
Cent. Dist. of Calif.
By ..... Deputy

Before: The Bankruptcy Appellate Panel

LAWRENCE J. GALARDI, a Professional Corporation and LAWRENCE J. GALARDI Appellants herein, intend to raise the following issues on Appeal from the Judgment entered against LAWRENCE J. GALARDI and LAWRENCE J. GALARDI, A PROFESSIONAL CORPORATION:

1. The Court committed reversible error in that the Findings of Fact are clearly erroneous in that the purported trier of fact made findings of fact from conflicting evidence without any basis in fact or law to judge the credibility of the witnesses giving the conflicting evidence;

2. The Court committed reversible error in that the record is entirely devoid of any evidence from which a purported trier of fact who did not judge the credibility of the witnesses could make findings of fact that support a judgment of punitive damages in this case;

3. There are no Findings of Fact or Conclusions of Law which in any way support entry of a Judgment in Adversary Proceeding No. LA 81-0656-BR and on that basis the Judgment is clearly erroneous.

4. The judgment against Appellant LAWRENCE J. GALARDI, is clearly erroneous in that liability as to him is totally unsupported by Findings of Fact in this case.

5. The Court committed reversible error in that the record fails to offer any basis for finding that the Appellants obtained money or property from the Plaintiff by false pretenses, false representations, and (or) fraud;

6. The Findings of Facts and Conclusions of Law and Judgment thereon are clearly erroneous as to Appellant LAWRENCE J. GALARDI in view of Findings of Fact 4, 5 and 7.

7. There is no evidence of an attorney-client relationship arising as a result of the execution of "the agreement" (Finding #32) and there are neither Findings of a fiduciary relationship between Plaintiff and Appellant Lawrence J. Galardi nor any evidence in the record to support any such Finding and the judgment therefore is clearly erroneous.

8. The Court committed reversible error in that the record fails to offer any basis for finding Appellants or either of them obtained money or property by fraud and/or defalcation while acting in a fiduciary capacity and/or by embezzlement;

9. The Court committed reversible error in that the record fails to offer any basis for finding Appellants or either of them obtained money or property by wilful and malicious injury (conversion) by Appellants, or either of them, to property of Plaintiff;

10. The Court committed reversible error in that a finding of attorneys fees of $78,858.97 and additional attorney's fees of $12,985.00 due Stutman, Treister and Glatt, a Professional Corporation, is totally unsupported by the trial court record made in the trial of Adversary No. LA 81-5204 R.S.

11. The Court lacked subject matter jurisdiction to enter judgment, in this case;

DATED: October 25, 1985

/s/ LAWRENCE J. GALARDI

Lawrence J. Galardi
Attorney for Appellants

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action or proceeding. My business address is: 606 South Olive Street, Suite 1900, Los Angeles, CA 90014-1521.

On October 25, 1985, I served the foregoing document described as Statement of Issues on the interested parties in this action or proceeding by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Max Rush, Esq.
SULMEYER, KUPETZ & ROTHMAN
615 S. Flower Street
Los Angeles, CA 90017

Anthony Castanares, Esq.
STUTMAN, TREISTER & GLATT
3699 Wilshire Boulevard
Suite 900
Los Angeles, CA 90010

Executed on October 25, 1985, at Los Angeles, California.

☐ (State) I declare under penalty of perjury that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ SHARI J. SYMONDS
Signature

LAWRENCE J. GALARDI
904 Silver Spur Rd.
Suite 291
Rolling Hills, California 90274
(213) 214-2289
Attorney for Appellants

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
BAP No. CC 85-1133

In re

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI,
a Professional Corporation and SHARI J. GALARDI,
Debtors.

BERNIE LERNER,
Plaintiff,

vs.

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI,
a Professional Corporation and SHARI J. GALARDI,
Defendants.

LAWRENCE J. GALARDI, LAWRENCE J. GALARDI,
a Professional Corporation and SHARI J. GALARDI,
Plaintiffs,

vs.

BERNIE LERNER,
Defendant.

APPELLANTS' FURTHER DESIGNATION OF RECORD

Bankruptcy No. LA 81-00606-BR
Adversary No. LA 81-5204-BR,
Adversary No. LA 81-0656-BR

Filed: October 28, 1985, Clerk, U.S. Bkcy. Court, Cent.

Dist of Calif. By ..... Deputy

Before: The Bankruptcy Appellate Panel

Appellants heretofore designated the Reporter's Transcript of Proceedings before the Hon. Russell B. Seymour and the Reporter's Transcript of Proceedings before the Hon. Barry Russell on March 20, 1985.

All of said transcripts have been completed.

Appellants also designated the exhibits marked in the proceedings tried before Judge Seymour LA 81-5204RS and all filings made in that Adversary Proceeding.

Appellants further, designate the Clerk's Files in LA81-0656RS and the Clerks Docket Sheets in LA81-00606RS.

DATED: October 25, 1985

Respectfully submitted,

/s/ LAWRENCE J. GALARDI
Lawrence J. Galardi
Attorney for Appellants

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action or proceeding. My business address is: 606 South Olive Street, Suite 1900, Los Angeles, CA 90014-1521.

On October 25, 1985, I served the foregoing document described as Appellants' Further Designation of Record on interested parties in this action or proceeding by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Max H. Rush, Esq.
SULMEYER, KUPETZ & ROTHMAN
615 S. Flower Street
Los Angeles, CA 90017

Anthony Castanares, Esq.
STUTMAN, TREISTER & GLATT
3699 Wilshire Boulevard
Suite 900,
Los Angeles, CA 90010

Executed on October 25, 1985, at Los Angeles, California.

☒ (State) I declare under penalty of perjury that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ SHARI J. SYMONDS
Signature

No. 85-1133

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

BERNIE LERNER,
Plaintiff-Appellee,
v.
LAWRENCE J. GALARDI,
LAWRENCE J. GALARDI, a Professional Corporation and
SHARI J. GALARDI,
Defendants-Appellants.

LAWRENCE J. GALARDI,
LAWRENCE J. GALARDI, a Professional Corporation and
SHARI J. GALARDI,
v.
BERNIE LERNER.

BEFORE: THE BANKRUPTCY APPELLATE PANEL

ON APPEAL FROM THE BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LA-81-5204-BR
LA-81-0656-BR
Filed March 19, 1986
(Initialed) Clerk U.S.
Bkcy. App. Panels of
the Ninth Cir.

APPELLANTS' OPENING BRIEF

LAWRENCE J. GALARDI, Esq.
1900 City National Bank
606 South Olive Street
Los Angeles, California 90014
(213) 627-8104

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action or proceeding. My business address is: 606 South Olive Street, Suite 1900, Los Angeles, CA 90014-1521.

On March 17, 1986, I served the foregoing document described as Appellants' Opening Brief on the Interested Parties in this action or proceeding by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Anthony Castanares, Esq.
STUTMAN, TREISTER & GLATT
3701 Wilshire Blvd.,
Penthouse Suite
Los Angeles, CA 90010

Richard S. Lerner, Esq.
9777 Wilshire Blvd.
Suite 1009,
Los Angeles, CA 90212

Max H. Rush, Esq.
SULMEYER, KUPITZ, BAUMANN & ROTHMAN
615 South Flower Street
Los Angeles, CA 90017

ROBINSON, WOLAS & DIAMANT
1888 Century Park East
Suite 900
Los Angeles, CA 90067

Executed on March 17, 1986, at Los Angeles, California.

☒ (State) I declare under penalty of perjury that the above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ SUZANNE E. CARROLL
Signature

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 20, 1987, I served the within Appendix to Petition for Writ of Certiorari in re: "Lawrence J. Galardi v. Bernie Lerner" in the United States Supreme Court, October Term 1987. Appendix filed under separate cover, No. . . .

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Anthony Castanares, Esq.
Stuttman, Treister & Glatt
3699 Wilshire Boulevard, Suite 900
Los Angeles, California 90010
(three copies)

Richard S. Lerner, Esq.
1800 Avenue of the Stars, Suite 1000
Los Angeles, California 90067-4212
(three copies)

Max Rush, Esq.
Sulmeyer, Kupetz, Bauman & Rothman
300 South Grand Avenue
Fourteenth Floor
Los Angeles, California 90071
(three copies)

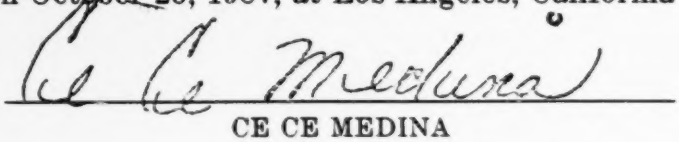
Robinson, Wolas & Diamant
1888 Century Park East
Los Angeles, California 90067
(three copies)

Clerk, United States Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(original and forty copies)

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 20, 1987, at Los Angeles, California



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